(18,411.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 247.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY AND JOHN H. JOHNSON, SHERIFF AND *EX OFFICIO* TREASURER OF WILKES COUNTY,

vs.

W. N. COLER & COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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a *Certified Transcript of Record.*

United States Circuit Court of Appeals, Fourth Circuit.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY ET AL., Appellants,
versus
W. N. COLER & COMPANY, Appellees.
} No. 319.

Appeal from the circuit court of the United States for the western district of North Carolina, at Greensboro.

Record filed June 30th, 1899.
Clerk's office, U. S. circuit court of appeals, fourth circuit. H. T. Meloney, clerk, Richmond.

1 *Transcript of Record.*

UNITED STATES OF AMERICA, *Western District of North Carolina,* } *To wit:*

At a circuit court of the United States for the western district of North Carolina, begun and held at the court-house, in the city of Greensboro, on the first Monday of April, being the 3rd day of the same month, in the year of our Lord one thousand eight hundred and ninety-nine.

Present: The Honorable Thomas R. Purnell, United States district judge of the eastern district of North Carolina, presiding and holding said court under provisions of section 603 of the Revised Statutes of United States.

Among others were the following proceedings, to wit:

THE BOARD OF COMMISSIONERS OF WILKES County and Others
versus
W. N. COLER and Others, Bankers, under the Firm Name and Style of W. N. Coler & Co.
No. 145. Equity.

Bill of Complaint.

UNITED STATES OF AMERICA,
Western District of North Carolina.

In the United States Circuit Court.

W. N. COLER, W. N. COLER, JR., BIRD S. COLER, JAMES W. Campbell, and Francis W. Coler, Bankers, under the Name and Style of W. N. Coler and Company, Complainants,
vs.
THE BOARD OF COMMISSIONERS OF WILKES COUNTY and Clarence Call, ex-Sheriff and *ex Officio* ex-Treasurer, and John H. Johnson, Sheriff and *ex Officio* Treasurer of Wilkes County, Respondents.
In Equity.

Bill.

To the honorable the judges of the circuit court of the United States, sitting in equity:

2 The complainants, W. N. Coler, W. N. Coler, Jr., Bird S. Coler, James W. Campbell, and Francis W. Coler, are each and every one, a citizen, and resident of the State of New York, and are bankers, under the name and style of W. N. Coler and Company; and the said complainants bring this their bill of complaint against the Board of Commissioners of Wilkes County, each and every member of said board being a citizen and resident of the State of North Carolina, and of the county of Wilkes, and within the western district of North Carolina; and, also bring this, their bill of complaint, against Clarence Call, ex-sheriff and ex-treasurer of Wilkes county, and also, against John H. Johnson, sheriff and *ex officio* treasurer of Wilkes county, within said district; and thereupon, your orators, complain and say:

1. That the matter in dispute exceeds, exclusive of interest and costs, the sum and value of two thousand dollars, this suit being to recover from the respondents, the sum of four thousand and two hundred dollars ($4,200.00) and to enjoin the respondents, from paying out, or in any manner disposing of, or interfering with, a sum of money, to wit: thirteen thousand dollars ($13,000.00), held by respondents, Clarence Call and John H. Johnson, sheriffs, and *ex officio* treasurers, as above set out, the said sum being amount due holders of coupons, interest on certain bonds, hereinafter mentioned, other than is directed by this court, the said sum of forty-two hundred dollars ($4,200.00) being due upon the coupons held by the

complainants, the said coupons being the obligations of the said county, to pay the complainants, said amount.

2. That your orators, under the firm name of W. N. Coler & Company, are engaged in the banking business in the city and State of New York, and as such, are buyers and sellers of municipal bonds.

3 That, as such, your orators bought, for valuable consideration, and for a large sum, the highest market price, a great number of bonds, to wit: fifty-five (55) county bonds of the denomination of one thousand dollars each, bearing interest, at the rate of six per centum, payable on the 1st day of April and 1st day of October, in each and every year. That the purchase of said bonds, was for value, in good faith, and without notice, express or implied, that there was any suggestion of their being void, invalid, fraudulent, or otherwise than perfectly legal, in their issue and sale.

4. That the total issue of bonds by the said county in pursuance of the authority and power conferred upon the board of com-
3 missioners of the same, and in pursuance of which power, the said bonds held by complainants were issued, as aforesaid, was in the amount of one hundred thousand dollars ($100,000), all of which bonds, as complainants are informed and believe, were sold, as aforesaid, and are owned, and have been in possession of *bona fide* holders, for value, without notice, and the interest on the same has been paid regularly at the times set out in this bill, for seven years, as complainants are informed and believe, the said bonds having been issued in the year 1889.

That a levy upon the property of the tax-payers of the county has been made, and the interest collected by the sheriff of the said county of Wilkes for each and every year, for eight years, as complainants, your orators, are informed and believe.

5. That the interest due and payable, as aforesaid, on about the first of April and October of each and every year, upon the bonds, held by complainants, as herein set out, is evidenced by certain coupons attached to said bonds, as follows, to wit:

2 coupons due April, 1896, from bonds Nos. 73 and 84....	$60 00
60 coupons due April, 1898, from bonds Nos. 4, 8, 9, 11, 13, 28, 51, 33, 37, 39, 43, 49, 56, 59, 63, 76, 78, 81, 83, 84, 86, 90.....	1,800 00
48 coupons due October, 1898, from bonds Nos. 4, 11, 13, 15, 17, 19, 21, 24, 28, 31, 33, 37, 43, 48, 56, 59, 63, 69, 72, 74, 76, 78, 81, 83, 85, 86, 88, 90.....	1,440 00
	$3,300 00

and the said sum is the interest due and still unpaid upon the bonds issued and purchased by your orators, complainants in this bill; and also the sum of nine hundred dollars, evidenced by other coupons in the hands of your orators and owned by them, the same attached to the said bonds. That the above sum your orators have demanded of respondents by presenting the said coupons, as has

heretofore been done, when payment was made, at the fourteen times, as aforesaid.

6. That, although the said sum of thirteen thousand dollars, collected from the tax-payers of the said county, by reason of a levy made by the board of commissioners, in pursuance of the power conferred upon the same, is in the hands of the said respondents, the said sheriffs, *ex officio* treasurers of the said county of Wilkes, for the purpose of paying the said interest, due and payable
4 on the 1st of April, 1896, on the 1st of April, 1898, and on the 1st of October, 1898, they, the said respondents, refuse to pay the same to the holders of the said coupons, your orators and complainants. That having received the said amount, for the purpose aforesaid, and only for that purpose, they, the said sheriffs, *ex officio* treasurers, and the respondent, the board of commissioners, under and by virtue of whose orders the said treasurers hold the said amount, have become trustees of the bond and coupon holders, between whom—your orators and them—there exists a relation fiduciary in its character, they, the said respondents, holding the said sum, for the use of, and in trust for, your orators, complainants, and for other bondholders, whoever, and wherever they are, or may be.

7. That as your orators are informed and believe, the reason the said *ex officio* treasurers of the county of Wilkes, have not accounted with complainants, as under the rules of equity and good conscience they are required to do, being, as they are, trustees, as aforesaid, is the fact, that the said board of commissioners, or its predecessors—the board of commissioners being a continuous body—sued out a certain process of injunction from one of the superior courts of North Carolina, within said western district, and caused the same to be served upon them, or the one of the said *ex officio* treasurers, holding the said sum, enjoining them, from accounting with the holders of any of the said bonds and coupons, and from paying over to them the interest due as aforesaid, which interest the board of commissioners has caused to be paid into the hands of the said *ex officio* treasurers, and to be held by them for the sole purpose of the payment of the said interest, due and payable as hereinbefore set forth.

8. That the proceedings in the said superior court of North Carolina, it being for the county of Wilkes, in which, this injunction was obtained, was begun in the name of the board of commissioners of said county, and, in the name of one C. C. Wright, an alleged tax-payer, as plaintiffs, against Clarence Call, sheriff, and *ex officio* treasurer of the county, as defendant, on the 23rd day of December, 1897. That the complainants, your orators, were not made parties to the same, nor was any other *bona fide* bondholder, made a party, as your orators are informed and believe. And your orators do further say, as they are advised and believe, that they, as such bondholders, are in no manner affected by the judgment or decree of the said State superior court, which granted the injunction, as aforesaid.

5 9. Your orators do further say that this proceeding in the State court was taken and commenced eight years after the

issue of these said bonds, and purchase of the same, by complainants, your orators; and, as they are informed and believe, for the purpose of repudiating the honest debt of the county, contracted and made in good faith, by the said county, which received full value and consideration for the same. That, as your orators are informed and believe, the said respondents, the board of commissioners, purposely avoided making the bondholders, your orators, or any other bondholders, parties defendants in the State court proceeding, to prevent a removal of the suit to the jurisdiction of this, the circuit court of the United States.

10. That, on the 18th day of February, 1898, the judge of the State supreme court, signed an injunction order, "that that defendant, Clarence Call, sheriff, of Wilkes county, be, and he is hereby, enjoined, and restrained," from paying any portion of the moneys in his hands, to the coupon-holders, in discharge of the interest due and payable, as aforesaid.

11. That the defendant in the said proceeding, Clarence Call, excepted to the order of the said superior court, and appealed to the supreme court of North Carolina, from the same.

12. That, after the said order of injunction was issued, in the said State court, and after the appeal was taken by the said Clarence Call, sheriff, and *ex officio* treasurer, on motion of counsel for J. M. Turner, and J. M. Wellborn, and by consent of the plaintiffs, the said Turner and Wellborn, as the alleged owners of one of the bonds of the county of Wilkes, were allowed to make themselves parties to the said proceeding, as defendants.

13. That, on the 8th day of March, and after the time had expired within which, the said defendant, Clarence Call, sheriff, was allowed to serve his statement of case, on appeal, to the supreme court of North Carolina, the said Turner and Wellborn filed an answer, in the said proceeding, asking that their rights as bondholders, be adjudicated.

14. That, on the 22nd day of March, 1898, on motion of counsel for plaintiffs in the said proceeding, the said superior court adjudged that the bonds were void, the board of commissioners, not having the power to issue the same.

15. That, on the 9th day of November, 1898, the supreme court of North Carolina, affirmed the judgment of the said superior court.

6 16. That the said proceeding, in the State court, in which the said order of injunction was issued, was purely an *ex parte*, collusive one, as your orators are informed, advised and believe, it being, in the first instance, an action by a principal to prevent an agent from doing a thing which the latter could not do, without the order of the former. The said sheriff and *ex officio* treasurer is under the control of the county commissioners, as is prescribed in the Code of North Carolina and could not pay money out, except by order of the board. That in this proceeding in the State court there were no adverse parties, and there could, under the laws of the State, be no action such as would authorize any court of the State, in the exercise of its jurisdiction, to take cognizance of.

16. That said Turner and Wellborn, as complainants are informed and believe, were no- adverse parties in this proceeding, but were made parties defendants by the court, and at the instance of the plaintiffs in the same. That as the complainants, your orators, are further informed and believe, they do not own the said bond-, as alleged in their answer, filed in the State court, but obtained the same for the purpose of becoming parties to the proceeding, and, to the end, that they might aid the plaintiffs in their effort to effect a repudiation of the said county bonds. That they avow, even now, as your orators are informed and believe, their purpose was, and is, to have these bonds declared null and void. That they did not appear in the supreme court, by counsel or otherwise, at the hearing of the appeal; nor did the defendant, Call, appear in said court. That, as your orators are informed and believe, the expenses incurred by the said Turner and Wellborn, in becoming parties to the said proceeding, have been paid by the commissioners for the county, and, although the defendants in the supreme court of the State, were adjudged to pay the costs of the proceeding, and execution for the same was issued against the said Turner and Wellborn, and their sureties on their appeal bond, yet, the same was paid by order of the county commissioners out of the funds of the county, in the sum of $24.30.

17. That, as your orators are further informed and believe, the said Turner and Wellborn have sued out a writ of error to *to* the Supreme Court of the United States, ostensibly for the purpose of reversing the judgment of the supreme court of North Carolina, in this proceeding, when really it is for the purpose, and to the end, that the decree of this court, in this suit, now begun by your
7 orators, may be anticipated. That, as your orators *and* informed and believed, the commissioners of the said county of Wilkes have agreed to pay the expenses, costs, &c., of suing out the said writ of error out of the county funds.

18. That your orators, complainants, are advised, and believe that there is no Federal question involved in the proceeding in the State court, and, upon inspection of the record in the same by the Supreme Court of the United States, the said writ of error will be dismissed.

19. That the Northwestern North Carolina Railroad Company, was chartered, by an ordinance of the constitutional convention of North Carolina, ratified the 8th of March, 1868, and published as chapter 17 of the ordinances of said convention. A copy of said ordinance is hereto attached, marked Exhibit A.

20. That, by virtue of said ordinance, the Northwestern North Carolina Railroad Company, was organized, on April 17th, 1868.

21. That your orators are advised and believe that the bonds in the sum of one hundred thousand dollars, issued by the board of commissioners of Wilkes county, as set out in this bill, were legally issued, and authorized, by the original charter, granted by the convention in 1868, and by an act of assembly of the 11th of August, 1868, which is in the following words: "Section 1 The General Assembly of North Carolina do enact that an ordinance entitled, 'An

ordinance to incorporate the Northwestern North Carolina Railroad Company,' ratified the 9th day of March, A. D. 1868, be and the same is, hereby re-enacted, ratified and confirmed:" and also, by sections, 1896 and 1897 of the Code of North Carolina: and also, by an act of the General Assembly of North Carolina ratified 20th day of February A. D. 1879, entitled an "Act to amend the charter of the Northwestern North Carolina railroad, for the construction of a second division from the towns of Winston and Salem, in Forsyth county, up the Yadkin valley, by Wilkesboro, to Patterson's factory, Caldwell county." Also by act of March 2nd, 1881, Exhibit G, hereto attached. Copies of these acts and sections of the code, are attached hereto, and marked B, C, D and E.

22. That the county of Wilkes, acting through its board of commissioners, and in accordance with the ordinance and acts, as above set out, subscribed the sum of one hundred thousand dollars to the capital stock of the Northwestern North Carolina Railroad Company, the proposition to subscribe the said amount having
8 been submitted to the qualified voters of the county, at an election held according to law, and a large majority of the said qualified voters, having voted in favor of the same.

23. That in return for, and in consideration of, said subscription, the said Northwestern North Carolina Railroad Company issued to the county of Wilkes, stock in, and to, the amount of one hundred thousand dollars, which stock the said county now holds, as your orators are informed and believe, and has held, since the issue of the said bonds, in the year 1889. That the said county, by reason of the holding of the said stock, has been represented on the board of directors of the said company, and continued to be until the said sale of the road was made, by decree of this court, in 1894. That the county of Wilkes long desired the completion of this railroad, and by reason of the same, has received great benefit, in the increased value of the lands of the county, and transportation facilities, for freight and passengers. That this railroad is the only one running within the limits of the county, and has been taxed by the county, each and every year since its construction.

24. That the said bonds, hereinbefore *delivered* and set out, were issued to the corporation by the said county on or about October 1st, 1889, in payment of the said subscription. A copy of the bond is hereto attached, it being one of the series issued, and is marked F.

25. That after the issue of the said bonds to the Northwestern North Carolina Railroad Company, they were duly exposed to sale, by said company, and your orators bought, as hereinbefore set out, those which they now hold, paying for them a large sum of money, the highest market price.

25a. That the validity of the bonds of the county of Forsyth, similar to the said bonds of the county of Wilkes, issued under the ordinance of the convention of 1868, has been upheld, by the supreme court of North Carolina in two cases, to wit: Hill *vs.* Commissioners of Forsyth County, 67 N. Car. R., 367, and Belo *vs.* Commissioners, &c., 76 North Carolina Rep., 489. That this ordinance

of the convention of 1868, is the one, incorporating the Northwestern North Carolina Railroad Company.

That the complainants, your orators, purchased these bonds, relying upon their being legal and valid obligations of the county of Wilkes; that, at the time of their issue and purchase, these bonds, and like bonds of other counties, were regarded and treated
9 as valid securities by the corporate authorities of the county of Wilkes, and other counties of the State; that they were so regarded and treated by the public, by the legal profession, and by the legislative, executive and judicial departments of the State. That the decisions of the supreme court of the State before, at the time of, and since, the issue of the said bonds, until 1897, appear to have assumed the validity of these bonds. That there was in North Carolina, a settled course of decisions of the court from 1870 to 1897, construing the constitution and statutes of the State, in favor of the validity of these bonds and like bonds. That there was an action begun in the county of Wilkes some years ago, as your orators are informed and believe, for the purpose of invalidating these bonds, and abandoned. That there never has been a pretense on the part of any one that these bonds were not issued in good faith, and that the county of Wilkes did not receive full value in return for same.

26. That the sheriff of the county of Wilkes, and *ex officio* treasurer, and ex-sheriff and *ex officio* ex-treasurer of the said county, and board of commissioners are, as your orators are advised, contending with one another for the possession of this sum of money, to wit: thirteen thousand dollars, which is in the hands now of the ex-sheriff, Clarence Call and John H. Johnson, sheriff and treasurer; and, unless restrained by the order and decree of this court, will make away with, or dispose of, the said sum, as your orators are advised, having refused to pay over the same, as received, and by such refusal, the said parties, respondents, have committed a breach of the trust reposed in them, and ignored their obligations, as hereinbefore set out. The amount due your orators is defined, set apart, and an acknowledged debt, in its nature accompanied by a right to the appropriation of the said sum, in the hands of the respondents, for its payment, your orators having an interest in the said sum and a lien thereon, under the conditions hereinbefore recited.

27. That, as advised, your orators say they are entitled to have an account stated between them and the respondents, to ascertain the condition of the sum held by respondents for them; and to ascertain what they are to receive upon their coupons; and they are further advised that, according to the rules of this court, they are entitled to have an injunction upon the said respondents against disposing of the said *said* sum, or any part of the same, in any other manner, than under the decree of this court; and, further, to have a receiver appointed to hold the said sum, as the agent and officer of this court.

10 Wherefore, the premises considered, your orators pray:

1. That this honorable court enter a decree compelling the taking and statement of an account as set out in this bill; that an

injunction, issue, upon the respondents, as set out in the bill, also; and that a receiver be appointed as set out therein.

2. That, if, in the opinion of this court, after reading the foregoing bill it shall be deemed advisable to do so, notice be issued to J. M. Turner and J. M. Wellborn to show cause why they should not be made parties to this suit, and requiring them to answer on oath as to the truth of the allegations and charges made against them in this bill.

3. That, if, in the opinion of this court, it shall be deemed advisable, notice be issued to all bondholders having an interest in the said sum to appear and file with the master, the receiver, their coupons, to the end that their rights may be ascertained, and amounts due them stated in the account, to be taken.

4. That not only a writ *of injunction*, conformably to the prayer of this bill be issued, and receiver be appointed, but, also, a writ of subpœna of the United States of America, directed to the Board of Commissioners of Wilkes County and Clarence Coll, ex-sheriff and ex-treasurer, and John H. Johnson, sheriff and treasurer of said county, commanding them on a certain day to appear and answer unto this bill of complaint, and to abide and perform such order and decree in the premises as to the court shall seem proper, and required by the principles of equity and good conscience.

5. That, if in anything your orators are mistaken in the relief prayed for, then they pray for all such other, further and general relief as the premises may warrant, and the rules of equity allow.

W. N. COLER & COMPANY,
By CHARLES PRICE, *Solicitor.*

This day comes Charles Price, who makes oath that he is the agent and attorney of the complainants, all of whom reside in the State and city of New York, and are absent from the western district of North Carolina; that, owing to their absence they are not able to make the verification of this bill; that the same is founded upon written instruments in the hands of this affiant for the
11 payment of money only: and, further, that the bill of complaint is true, except as to matters stated on information and belief, and as to those matters he believes it to be true.

CHARLES PRICE.

Sworn to and subscribed before me this 22nd day of February, 1899.

[SEAL.]

McLAIN PLEASANTS,
U. S. Com., East. Dist. Va.

United States Circuit Court, Western District of North Carolina.

W. N. COLER AND COMPANY, Complainants,
vs.
THE BOARD OF COMMISSIONERS OF WILKES COUNTY, NORTH Carolina, and Clarence Call, ex-Treasurer, and John H. Johnson, Treasurer of Wilkes County.

On reading the verified bill in the above-entitled suit and exhibits, filed as a part thereof, it is ordered that the complainants' motion for injunction and receiver, &c., pursuant to the prayer of the bill, be set down for hearing at 12 o'clock m., before the circuit court of the United States, at Asheville, North Carolina, on the 8th day of March, 1899, or as soon thereafter as counsel can be heard. This being a proper case for granting a temporary restraining order, it is ordered and decreed that until the hearing of such motion for injunction and receiver, &c., and the further order of the court thereon, the respondents, The Board of Commissioners of Wilkes County, and Clarence Call, ex-sheriff and ex-treasurer, and John H. Johnson, sheriff and treasurer of said county, are restrained and prohibited from making way with, disposing of, or in any manner interfering with the sum of money, to wit: thirteen thousand dollars, or any part of the same, which may be in their hands or in the hands of any one of them, as alleged in the bill.

It is further ordered that a certified copy of this order be served upon the respondents, by reading and delivering a copy thereof.

It is further ordered that subpœnas issue to the respondents as prayed for in the bill.

NATHAN GOFF,
U. S. Circuit Judge.

Feb'y 22, 1899.

12 EXHIBIT "A."

CHAPTER XVII.

An ordinance to incorporate the Northwestern North Carolina Railroad Company.

SECTION 1. Be it ordained by the people of North Carolina in convention assembled, and it is hereby ordained by authority of the same: That for the purpose of constructing a railroad of one or more tracks, from some point on the North Carolina railroad, between the town of Greensboro, in Guilford county, and the town of Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county, to some point in the northwestern boundary line of the State, to be hereafter determined, a company is hereby incorporated under the name and style of the Northwestern North Carolina Railroad Company, with a capital stock of two millions of dollars, which shall have a corporate existence as a body politic, for the space of ninety-nine years, and by that name may sue and be sued, plead and be impleaded, in any court of law and equity in

the State of North Carolina; and may have and use a common seal, and shall be capable in law and equity of purchasing, holding, leasing and conveying estates, real and personal, and mixed, and acquiring the same by gift or devise, so far as may be necessary for the objects herein contemplated, and no further; and said company may enjoy all other rights and immunities which other corporate bodies may lawfully exercise, and may make all necessary by-laws and regulations for its government not inconsistent with the constitution and laws of the State of North Carolina and of the United States.

SEC. 2. Be it further ordained, That the capital stock of said company may be created by subscriptions on the part of individuals, corporations and counties, in shares of one hundred dollars.

SEC. 3. Be it further ordained, That books of subscription to the capital stock of said company shall be opened by the following commissioners, to wit: I. G. Lash, J. A. Vogler, H. W. Fries, in the town of Salem; and Thomas J. Wilson, Joseph Masten, R. A. Wilson, in the town of Winston, and by such other persons and in such other places as the aforesaid commissioners may direct; and that ten days' notice of the opening of said books shall be given in one or more newspapers of this State; and, furthermore, that the said commissioners, or any four of them, may, at any time after said
13 books have been kept open for the space of thirty days, and the sum of thirty thousand dollars has been subscribed to the capital stock of said company and five per cent. paid thereon, have power to call together the subscribers to said stock for the purpose of completing the organization of said company; and the said subscribers shall be and are hereby declared incorporated into a company by the name and style of the Northwestern North Carolina Railroad Company; and the said company may, from time to time, receive other subscriptions to its capital stock as it may deem proper.

SEC. 4. Be it further ordained, That the company may hold annual meetings of its stockholders, and oftener if necessary, and at its organization and the annual meetings subsequent thereto, ten directors shall be elected to hold office for one year, or until their successors shall be elected; and any of said meetings shall have power to make or alter the by-laws of the company: Provided, that in all such meetings of the stockholders a majority of all the stock subscribed shall be represented in person or by proxy, which proxy shall be verified in the manner prescribed by the by-laws of the company; and each share thus represented shall be entitled to one vote on all questions; and that it shall be the duty of the directors of the company to elect one of their own number as president of said company, and to fill all vacancies in their board.

SEC. 5. Be it further ordained, That after the organization of said company and the election of the president and other necessary officers, the officers so elected shall proceed, under the advice of the directors, to locate the eastern terminus of the Northwestern North Carolina railroad, and shall proceed to construct said road, with one or more tracks, as speedily as practicable, in sections of five miles each, to the towns of Winston and Salem in Forsyth county, which

portion of said railroad, when completed, shall constitute its first division: Provided, that if the distance from the nearest section to the towns of Winston and Salem be less than five miles, the same shall be considered a section.

SEC. 6. Be it further ordained, That said company shall have the same power to call for and enforce the payment of stock subscribed as was heretofore granted to the North Carolina Railroad Company, by their charter of incorporation; and shall have power to condemn land for the use of the company, when a contract of purchase cannot be made with the owner thereof, to the same extent and in the same manner and under the same rules, regulations and restrictions as the said North Carolina Railroad Company were authorized to do by their act of incorporation.

SEC. 7. Be it further ordained, That all contracts made and entered into by the president or superintendent of the company, whether with or without seal, shall be binding upon the company; and the president shall, under the instruction of the board of directors, issue certificates of stock to the stockholders, which shall be transferable in the manner prescribed by the by-laws of the company.

SEC. 8. Be it further ordained, That whenever the president and chief engineer of said company shall certify to the governor of the State that the grading of any of the sections of said road, as mentioned in section 5 of the ordinance, is completed and ready for the superstructure, he shall direct the public treasurer of the State to loan in behalf of the State to the said company the sum of fifty thousand dollars in coupon bonds; and in like manner the governor will direct similar loans to be made to the company upon the completion of the grading of each and every section, until the first section is graded entire; and said company shall set aside the receipts of the road over and above its annual expenses, as a sinking fund to pay the said debts and interests, the whole amount of said debt and interest to be paid before the said company shall order any dividends on the stock of the company; and that said sinking fund so produced shall be semi-annually paid into the public treasury.

SEC. 9. Be it further ordained, That no part of said loan or bonds shall be delivered to said company until the president and directors thereof shall execute and deliver to the governor of the State a mortgage on the entire road and its property, conditioned to save the State harmless against the loss of both principal and interest of said loan.

SEC. 10. Be it further ordained, That the coupon bonds loaned, as aforesaid, shall be signed by the governor, countersigned by the treasurer and sealed with "the great seal of the State," bearing six per cent. interest, the principal payable at the end of thirty years from the date thereof, and the coupons for the interest payable semi-annually in such form as the public treasurer may direct.

SEC. 11. Be it further ordained, That the company may have the exclusive right of transporting persons and freight upon said road at such rates of charges as the board of directors may fix, and may have power to farm or lease the same to any person or persons or corporation.

SEC. 12. Be it further ordained, That the stockholders of said company may pay the stock subscribed by them either in money, labor or material for constructing said road, as the board of directors may determine, and that all counties or towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company, for the government of such towns and counties as are now allowed to subscribe to the capital stock of said company.

SEC. 13. Be it further ordained, That the company shall have power to construct branches of said road, one of which shall run from the towns of Winston and Salem by way of Mount Airy, in Surry county, to the line of the State of Virginia.

SEC. 14. Be it further ordained, That this ordinance shall be in force from and after its passage.

Ratified this 9th day of March, A. D. 1868.

CALVIN J. COWLES, *President.*

T. A. BYRNES, *Secretary.*

EXHIBIT "B."

An act ratifying and confirming the charter of the Northwestern North Carolina Railroad Company.

SECTION 1. The General Assembly of North Carolina do enact that, an ordinance entitled "An ordinance to incorporate the Northwestern North Carolina Railroad Company," ratified the 9th day of March, A. D., 1868, be, and the same is hereby re-enacted, ratified and confirmed, and all acts and things heretofore done under the provisions of said ordinance are hereby ratified and confirmed.

SEC. *3.* That all the rights, powers and authorities conferred or purporting to be conferred by said ordinance incorporating the Northwestern North Carolina Railroad Company on the justices of the peace of Forsyth county, or of the county court of said county be, and the same are hereby conferred on the commissioners of said county.

SEC. 3. That the commissioners of the county of Forsyth
16 are hereby invested with full powers and authority to levy from time to time, such tax as may be sufficient to pay the subscriptions made by said county to the capital stock of the Northwestern North Carolina Railroad Company, and any interest due thereon, or to liquidate any debt created by said county in borrowing money to pay such subscription stock.

Ratified the 11th day of August, A. D., 1868.

EXHIBIT "C."

Section 1996 of the Code of North Carolina.

The boards of commissioners of the several counties shall have power to subscribe stock to any railroad company or companies when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest.

EXHIBIT "D."

Section 1997 of the Code of North Carolina.

The board of commissioners of any county proposing to take stock in any railroad company shall meet and agree upon the amount to be subscribed, and if a majority of the board shall vote for the proposition, this shall be entered upon the record, which shall show the amount proposed to be subscribed, to what company, and whether in bonds, money or other property, and, thereupon, the board shall order an election to be held on a notice of not less than thirty days, for the purpose of voting for or against the proposition to subscribe the amount of stock agreed on by the board of county commissioners. And if a majority of the qualified voters of the county shall vote in favor of the proposition, the board of county commissioners, through their chairman, shall have power to subscribe the amount of stock proposed by them and submitted to the people subject to all the rules, regulations and restrictions of other stockholders in such company or companies. Provided, that the counties, in the manner aforesaid, shall subscribe from time to time such amounts, either in bonds or money as they may think proper.

17 EXHIBIT "E."

CHAPTER 43.

An act to amend the charter of the Northwestern North Carolina railroad for the construction of a Second division from the town- of Winston and Salem, in Forsyth county, up the Yadkin valley by Wilkesboro to Patterson's factory, Caldwell county.

The General Assembly of North Carolina do enact:

SECTION 1. That section thirteen of chapter seventeen of the ordinance of the convention of one thousand eight hundred and sixty-eight, ratified the ninth day of March, one thousand eight hundred and sixty-eight, be amended by adding the words " and one of which shall be constructed from the town- of Winston and Salem, up the valley of the Yadkin by the way of Jonesville and Wilkesboro, in the county of Wilkes, to Patterson's factory, in the county of Caldwell, which branch shall be known as Second division."

SEC. 2. That said ordinance be amended by inserting a new section between sections thirteen and fourteeen, to read as follows: " That the penitentiary board is authorized and directed to farm out to (the) president and directors of said company, for the purpose of constructing the Second division of said road, two hundred able-bodied convicts to work on the construction of said railroad, but the said convicts shall be at all times under the supervision and control, as to their government and discipline, of a supervisor, who shall be appointed by the governor upon the recommendation of said railroad company: Provided, that there shall be an estimate made of the net value of the labor done by said convicts on the road of said

company to be fixed on a just and equitable basis by the president of said company and a person appointed by the governor on the part of the State, and the net value of labor shall be a first lien on all property and franchises of said Second division of said railroad. Provided, further, that the State shall not be at any expense for the feeding, clothing or other care of said convicts."

SEC. 3. Nothing in this act shall be construed to interfere with the convicts assigned to any road in which the State has an interest.

SEC. 4. That any township or city, town, county, or other
18 municipal corporation of this State, shall have power and authority to subscribe for and take any number of shares of capital stock of said company that a majority of the voters of such township or city, town, county or other municipal corporation may elect to take therein. That upon (the) request of twenty resident and tax-payers of any such township or city, town, county, or other municipal corporation of this State, the municipal corporation (and in case of township, the justices of the peace of such township) shall determine the number of shares in the said company proposed to be taken by such township or city, town, county or other municipal corporation, and shall appoint a day on which an election shall be held in such township or city, town, county, or other municipal corporation, in the manner prescribed by law for holding elections, at which election the legally qualified voters of such township or city, town, county, or other municipal corporation, shall be entitled to vote for or against such subscription, the legally qualified voters favoring such subscription to vote ballots written or printed "Railroad," those opposing such subscription to vote "No railroad." The election herein provided for shall be held at the usual voting places for such townships or cities, towns, counties, or other municipal corporations, (and in case of townships, by justices of the peace of such townships) in the same manner that persons are appointed for holding other elections. And the returns thereof shall be made and the result thereof announced as in other elections prescribed by law. Provided, that in case of townships the justices of the peace of such township, for carrying out the purpose of this act shall be vested with all the powers vested in the boards of commissioners and justices of the peace of counties as to the manner of appointing the persons to hold elections, and so forth, by law for the purpose of holding other elections, and townships shall have corporate powers for the purpose of this act. If the result of any such election shall show that a majority of the qualified voters of any township or city, town, county, or other municipal corporation, favor the taking of the amount of stock so voted for in such election, then the authorities who by this act, are empowered to determine what amount of stock shall be taken shall subscribe the amount of stock so voted for in said company, and shall have power to levy and collect taxes for that special purpose to pay for the said stock in installments as the same may become due, or, in case it shall not be deemed best to collect taxes to pay by taxation such subscription for stock, then such township, or city, town, county

or other municipal corporation, shall have power to issue
19 bonds for the purpose of raising money to pay for such subscription, and shall provide for the payment of interest upon said bonds, and also for the payment of said bonds when they become due. Provided, however, that any township, county or other corporate authorities who shall issue any bonds or issue any obligations in behalf of this road shall be required to commence as soon as said obligations are assumed to provide a sinking fund that shall be sufficient to liquidate said bonds or obligations at maturity; provided further, that nothing in this charter shall be construed to exempt said railroad from taxation.

SEC. 5. That this act shall be in force from and after its ratification.

Read three times in the General Assembly and ratified the 20th day of February, A. D. 1879.

EXHIBIT "F."

Six per Cent. Bond.

(Copy.)

The County of Wilkes, State of North Carolina, is indebted to the bearer in the sum of one thousand dollars, lawful money of the United States, payable on the first day of October, 1904, with interest thereon from the first day of October, A. D. 1889, at six per cent. per annum, payable on the first days of April and October in each year, at the Wachovia National Bank of Winston, North Carolina, on presentation and surrender of the respective coupons hereto attached, as they severally become due and payable.

This bond is one of a series of one hundred bonds of the denomination of one thousand dollars each, issued by authority of an act of the General Assembly of North Carolina, ratified the 20th day of February, A. D. 1879, entitled "An act to amend the charter of the Northwestern North Carolina railroad for the construction of a Second division from the towns of Winston and Salem, in Forsyth county, up the Yadkin valley, by Wilkesboro, to Patterson's factory, Caldwell county," and authorized by a vote of a majority of the qualified voters of Wilkes county, by an election regularly held for that purpose, on the 6th day of November, A. D. 1889, and by an order of the board of commissioners of Wilkes county, made on the first day of April, A. D. 1889. This series of bonds is issued to pay the subscription of one hundred thousand dollars, made to the capital stock of the Northwestern North Carolina Railroad Company by said county of Wilkes. In witness whereof, the chairman of the
20 board of county commissioners and the clerk of the said board have hereunto subscribed their names, and the said clerk has affixed the seal of said board of commissioners, this 1st day of October, A. D. 1889.

(Signed) R. W. COLVARD,
Chairman Board of Commissioners of Wilkes Co.

(Signed) J. M. ADAMS,
[SEAL.] *Clerk Board of Commissioners Wilkes Co.*

EXHIBIT "G."

An act to authorize the Northwestern North Carolina Railroad Company to extend its road and to build branches thereof.

The General Assembly of North Carolina do enact:

SECTION 1. That it shall be lawful for the Northwestern North Carolina Railroad Company to extend and construct its line of road, or a branch thereof, to commence at or near Winston, in the county of Forsyth, through the counties of Forsyth, Davidson, Yadkin, Davie, Rowan, and Iredell, or any or either of them, to Statesville, or some other point on the Western North Carolina railroad, and may build and operate additional branches thereto, or from its present main line to any important mines or manufactories in any of said counties, or counties adjacent to them; provided, that nothing contained in this act shall operate to be construed so as to prevent or interfere with the construction of the North Carolina extension of the Virginia Midland railroad from Danville, Virginia, via Winston, Forsyth county, and Mocksville, Davie county, to some point on the Atlantic, Tennessee, and Ohio railroad in Iredell county; but said company is hereby authorized to build said road under the organization and consolidation heretofore made by the stockholders and directors of the consolidated line composing the North Carolina extension.

SEC. 2. That to provide the means in whole or in part for this purpose, the said company may receive subscriptions in money, labor, property, or otherwise, as the said company may agree, and may mortgage or otherwise pledge its property and franchises and the work constructed, or to be constructed, with the franchises and rights connected therewith.

SEC. 3. That any corporation, county, city, town or township interested therein, may subscribe to stock for said purpose, or
21 otherwise contribute to such work in such manner and in such amount as shall be determined by the proper authorities of such corporation, county, city, town, or township, and agreed on with the said Northwestern North Carolina Railroad Company.

SEC. 4. This act shall be in force from and after its ratification.

In the General Assembly, read three times and ratified this the 2nd day of March, A. D. 1881.

EXHIBIT "H."

1. Statutes bearing on the authority to issue bonds.
   Chapter 136 of the Laws of N. C., 1852.
   Chapter 17 of Ordinances of Constitutional Convention of 1868.
   Chapter 33 of the Laws of 1868 and 1869.
   Chapter 90 of the Laws of 1868 and 1869.
   Chapter 100 of the Laws of 1869 and 1870.
   Chapter 178 of the Laws of 1870 and 1871.

Chapter 25 of the Laws of 1871 and 1872.
Chapter 47 of the Laws of 1871 and 1872.
Chapter 140 of the Laws of 1872 and 1873.
Code of North Carolina, section 1967, subsection 10.

2. As to board of commissioners being successors of justices of the peace.

Green *vs.* Commissioners, 67–117. Johnston *vs.* Commissioners, 67–101.
Alexander *vs.* Commissioners, 67–331. Street *vs.* Commissioners, 70–644.

3. As to decisions upholding Forsyth County bonds issued to road.

Hill *vs.* Commissioners, 67–367. Belo *vs.* Commissioners, 76–489.
Galloway *vs.* R. R. Co., 63–147. Bank *vs.* Statesville, 84–169.

Extracts from Journal of House of Representatives, Filed as Exhibit to Bill of Complaint.

The following extracts from the Journal of the House of Representatives of the General Assembly of North Carolina were offered with the entire printed Journal, to show that the act of August 11, 1868, which is one of the exhibits attached to the bill of complaint, failed to pass in the manner prescribed by the constitution of North Carolina, article 2, section 14:

22 "A message was received from the Senate concurring in the amendment to the bill in relation to marriage licenses."..... .....

....

"Also a message transmitting a bill ratifying and confirming the charter of the Northwestern North Carolina Railroad Company..... .....

....

"On motion of Mr. Vest, the senate bill to ratify the charter of the Northwestern North Carolina Railroad Company was taken up, and referred to the finance committee."..... .....

....

"The senate bill to ratify the charter of the Northwestern North Carolina Railroad Company passed its final reading."..... .....

....

"Mr. Rhodes, from the committee on enrolled bills, reported as correctly enrolled the following, which were signed by the speaker and transmitted to the senate:

"A bill ratifying the charter of the Northwestern North Carolina Railroad Company."

The foregoing were the only entries in reference to the passage of the said act contained in the official printed Journal, and it was not denied that it failed to pass in accordance with art. 2, sec. 14.

Endorsed: Filed in this office, April 17, 1899. Sam'l L. Trogdon, clerk.

Equity Subpœna.

UNITED STATES OF AMERICA,
Western District of North Carolina.

The United States of America to the Board of Commissioners of Wilkes County and Clarence Call, ex-sheriff and *ex officio* ex-treasurer, and John H. Johnson, sheriff and *ex officio* treasurer of Wilkes county:

We command you, and every one of you, that you appear before the judges of our circuit court of the United States of America, for the western district of North Carolina, in the town of Asheville, in said district at 12 o'clock m., on the eighth day of the month of March next, at which time and place this cause is set down
23 for hearing, to answer the bill of complaint of W. N. Coler, W. N. Coler, Jr., Bird S. Coler, James W. Campbell, and Francis W. Coler, bankers, under the name and style of W. N. Coler and Company, filed in the clerk's office of said court in said town of Statesville, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the western district of North Carolina to execute.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Statesville, in said district, the 25th day of February, 1899, and in the 123rd year of the Independence of the United States.

H. C. COWLES, *Clerk.*

MEMORANDUM.—The within-named defendants are notified that unless they enter their appearance in the clerk's office of said circuit court, at Asheville, in said district aforesaid, on or before the day to which the within writ is returnable, the complaint will be taken against them as confessed and a decree entered accordingly.

(Signed) H. C. COWLES, *Clerk.*

Endorsed.

Received Feb'y 25–'99. Executed same day by delivering certified copies of same to J. T. Peden, chairman board of county comm'rs of Wilkes Co., and Clarence Call, ex-sheriff and *ex officio* ex-treasurer, and to John H. Johnson, sheriff and *ex officio* treasurer of said county.

J. M. MILLIKAN, *U. S. M.*,
By P. D. ATWELL,
Dep-ty U. S. M.

Endorsed: Filed in this office, April 12, 1899. Sam'l L. Trogdon, clerk.

24 *Answer of Board of Commissioners of Wilkes County.*

UNITED STATES OF AMERICA:

In the United States Circuit Court, Western District of North Carolina.

W. N. COLER, W. N. COLER, JR., BIRD S. COLER, JAMES W. Campbell, and Francis B. Coler, under the Name and Style of W. N. Coler & Company, Complainants,

versus

THE BOARD OF COMMISSIONERS OF WILKES COUNTY and CLARence Call, ex-Sheriff and *ex Officio and* ex-Treasurer, and John H. Johnson, Sheriff and Treasurer *ex Officio*, of Wilkes Co., Respondents.

The Board of Commissioners of Wilkes County, the above-named respondents, reserving to themselves the right to demur to the jurisdiction of the court, for answer to the bill of complaint of the plaintiff, says:

1.

That in answer to the first paragraph of the bill of complaint, these respondents say that they have no knowledge or information sufficient to form a belief as to the allegation that the plaintiffs are the holders of what purport to be the bonds of the county of Wilkes; but if it be true that they had such papers, these respondents are advised by counsel, and therefore allege that they are invalid for want of authority of law in the board of commissioners of Wilkes county to issue such bonds or create a bonded indebtedness against said county, under either the statute recited as authority in the face of such pretended bond, or by virtue of any power conferred by any other acts of the General Assembly of North Carolina relied upon by the complainants to sustain their authority.

2.

That the allegations contained in paragraph second of the bill of complaint are, as respondents are informed and believes, true.

3.

That respondents have no knowledge or information sufficient to form a belief as to the price paid by the complainant for bonds; but respondents deny the truth of the allegation that such bonds were purchased without notice express or implied that they were void and invalid, and aver that there was no act of the General Assembly of North Carolina which authorized the board of commissioners of Wilkes county to create such bonded indebtedness. Respondents especially aver that the amendments to the charter of the North Western North Carolina Railroad Company are void for the reason, that they were not enacted in accordance with the mandatory requirements of article 2, section 14, of the con-

stitution of North Carolina, including in the amendments to which this foregoing averment applied, not only those enacted by the General Assembly at its session of 1879 and 1881, respectively, but also to the amendments of said charter enacted at the special session of 1868 of the General Assembly of North Carolina, and in reference to said last-named amendment, respondents aver that, if it had not been invalid because not enacted in accordance with said requirements, it nevertheless upon its face failed to confer or purport to confer any authority to issue bonds or to lay a special tax to pay the same other than to the county of Forsythe. These respondents further aver that the original charter of the North Western North Carolina Railroad Company was enacted as an ordinance of the constitutional convention of 1868 and went into effect and became operative before the ratification of the constitution framed by said convention on the 24th of April, 1868, for the reason that certain restrictive clauses contained in articles 5 and 7 of said constitution, limited the powers of the counties and other municipal corporations by prescribing conditions precedent to the exercise of authority by them to create such bonded indebtedness and rendered it necessary that new enabling acts should be passed by the General Assembly after the ratification of the constitution on said 24th day of April, 1868, in order to clothe such municipal corporations with power to create such indebtedness, as respondents are advised.

4

These respondents admit that the Board of Commissioners of Wilkes County issued without authority of law what purported to be bonds to the amount of one hundred thousand dollars ($100,000), and aver that said bonds were issued without authority of law, and that all purchasers of such bonds are required to look to the legal authority for their issue and in contemplation of law were charged with the nature of the said insufficiency of the statutory authority relied upon.

26 Respondents admit that interest on said bonds was paid for eight years, but deny that, as respondents are advised, the payment of interest on such void bonds can impart validity to them.

5

Respondents have no knowledge or information sufficient to form a belief as to the allegations contained in the 5th paragraph of the bill of complaint and therefore demand strict proof.

6

These respondents admit that no interest has been paid by the county of Wilkes on the said pretended bonds since December, 1897, but deny the allegation therein contained that the defendants, The ex-Treasurer and The Treasurer of Wilkes County, sustained a fiduciary relation to the complainants or that such relation exists between these respondents and the complainants, as respondents are advised and believe.

7

These respondents, still denying that fiduciary relation exists, admit that their predecessors in office, whose term expired on the first Monday in December, 1898, did bring an action to enjoin Clarence Hall, then *ex officio* treasurer of Wilkes county, and that an order of injunction was granted in the superior court of Wilkes county, which upon a subsequent appeal to the supreme court of North Carolina was held to be the proper exercise of the extraordinary powers of the court, and that it appeared in said action that there was fund in the hands of said treasurer, collected under a levy made for the purpose of paying the interest on such pretended bonded debt semi-annually.

8

These respondents admit that said action was brought in the name of the Board of Commissioners of Wilkes County and C. C. Wright, a tax-payer, but upon information and belief deny the allegation that no bondholder was made a party, and aver, upon information and belief, that one J. M. Turner and J. M. Welborn were on motion made defendants in this action, and claiming as the holder of one of the said pretended bonds, and after inviting all other holders of such bonds to join with them, appealed from an adverse judgment of the superior court of Wilkes county to the supreme court of North Carolina, upon the hearing of which appeal it was adjudged that the said bonds were invalid.

27 9.

Respondents aver that the action in the State court referred to in the 9th paragraph of the complaint was brought by their predecessors in office, but, as respondents are advised and believe, the said action was brought under the advice of counsel that the said bonds were void *ab initio*, for want of lawful authority to issue them, and that all purchasers are charged with notice of such defect of power, and that it was a refusal to pay an invalid debt, not a repudiation of a valid obligation, and respondents are advised that the supreme court of North Carolina, by its adjudication in said action, sustained the contention of their predecessors.

Respondents have no information as to the motives which induced their predecessors in office to bring said action in the courts of the State of North Carolina, but are advised that citizens of the State are not required to apologize for seeking redress or protection from any courts of competent jurisdiction. Upon information and belief, respondents aver that the counsel for their predecessors in office would, when said action was brought, have made any bondholders who could be reached by the process of said court parties defendant, if they had known of any such holders.

10.

Respondents admit the truth of the allegations, contained in the tenth (10) paragraph of the complainants' complaint.

11.

Answering the eleventh paragraph of the complaint, these respondents admit that on the 18th day of February, 1898, the Hon. Henry R. Starbuck adjudged after a hearing upon an order to show cause, that the defendant therein, Clarence Call, should be enjoined and restrained until the final hearing of this cause from paying any portion of the interest on the bonds in controversy, and respondents further admit and aver that on the 18th day of February, 1898, the said Starbuck, judge, as aforesaid, entered upon the back of said restraining order, or injunction, the following memorandum or order of appeal:

"To this judgment defendant excepts, 15 days allows- defendant to serve statement of case on appeal and 10 days thereafter allowed pl't'ff to serve exceptions or counter-statements. Appeal bond fixed at $100. H. R. Starbuck, judge."

28 Further answering said section 11 of complaint, these defendants aver that under the provisions of 550 of the Code of North Carolina, the defendant, Call, as they are advised, would have been allowed but ten days from the entry of appeal taken on said 18th day of February to prepare and serve his statement of case on appeal but for the stipulation of opposing counsel to agree to 15 days, but, as respondents are informed and believe, and are advised, before the expiration of the said 15 days from said 18th day of February, Lindsey Patterson, Esq., counsel for the said Clarence Call, sheriff and *ex officio* treasurer as aforesaid, notified A. C. Avery, of counsel for the plaintiff in said action that he, the said Patterson, would not perfect or prosecute said appeal, and that, as respondents are informed and believe, the said Patterson notified said Starbuck, judge, before the expiration of the said 15 days of his purpose to abandon such appeal, and that the said Starbuck informed the said Avery that the said Patterson had so communicated his purpose to him. Respondents further answering said last-named paragraph, say that, as they are informed and believe, on the 7th day of March, 1898, at the spring term of the superior court of Wilkes county, and after the expiration of the said 15 days from the said 18th day of February, and before any motion was made for a final judgment, the said J. M. Turner and J. M. Welburn moved the said court, as the owners of one of the bonds in controversy, to be allowed to become parties defendants, and said order was on the same day allowed by Coble, judge, presiding, and was filed on the 18th of March, 1898, upon which day also the said Turner and Welburn, in pursuance of said order, filed their answer in said action.

Further answering said last-named paragraph of bill of complaint, these respondents aver that, as they are informed and believe, on said 8th day of March, 1898, the counsel for the plaintiff in said action, and R. N. Hackett, counsel for the defendants, Welburn and Turner, upon a suggestion of the Hon. Albert Coble, judge presiding, that he was the brother-in-law of the said J. Lindsey Patterson, who was not only counsel for the said Clarence Call, but was also counsel for his stepmother and the stepmother of the wife of Judge

Coble, and that the stepmother, Mrs. Patterson, was the holder of several thousand dollars of said Wilkes County bonds, agreed that the said Coble might make a consent order that a motion which had been made on the filing of said answer on behalf of said Turner and Welburn to vacate the restraining order theretofore made by said Starbuck, at chambers, might be heard before said Starbuck,
29 judge, and that thereupon the said motion was heard by the said Starbuck at chambers, at Morganton, on the 22nd day of March, 1898, and that from a refusal of this said motion the defendant-, Turner and Welburn, appealed to the supreme court of North Carolina, upon the hearing of which appeal the said bonds were adjudged to be void and invalid, as aforesaid.

12.

That for answer to the 12th paragraph, these respondents refer to the averments above set forth in answer to paragraph 11.

13.

These respondents admit that the defendants, Turner and Welburn, were allowed as aforesaid, to file an answer after the expiration of the time allowed said Call, but respondents are advised that the said answer was filed in accordance with the established practice of the said courts before any final judgment had been prayed, or any final judgment had been entered in this action.

14.

Answering the 14th paragraph of the complaint, these respondents admit that the superior court adjudged upon the hearing that the bonds were void for want of power in the commissioners to issue them.

15.

That the allegations contained in the 15th section of the complaint are admitted to be true.

16.

These respondents are advised by their counsel that the legal opinion contained in the 16th paragraph of the bill of complaint, to the effect that the said action was a proceeding instituted by a principal against an agent, is erroneous, and in conflict with the opinion of the supreme court of North Carolina construing its own statutes, and in defining the duties and powers of its own officers thereunder, as appears in the opinion of Board of Education *vs.* Commissioners, 113 North Carolina, at pages 379, 388, 389. These respondents deny the allegations that there was no adverse party to said action, and aver that, had the said Call paid out the funds in his hands levied for the purpose of paying the interest on said bonds to the holders of the said bonds contrary to the orders of the said commissioners of the county of Wilkes — would not, as respondents are advised by
30 counsel, have had any redress under the law as construed by the supreme court of the State against said treasurer officially or upon his bonds. Further answering, the respondents say that

they are advised that the supreme court of North Carolina passed upon an appeal in a similar case brought for a similar purpose, wherein the only parties were the Commissioners of Stanley County, as plaintiffs, and the treasurer of said county, as defendant, and that it was the duty of the said court, of its own motion, to dismiss where there was a want of jurisdiction, and these respondents are advised that the said court, in legal contemplation, gave its sanction to the right to maintain said action against said treasurer.

That these respondents have no personal knowledge as to whether the said Turner and Welburn are or not the owners of the said bonds, but are informed and believe that the said Turner and Welburn are ready to file affidavits that they are the *bona fide* owners of the bond claimed by them, and, upon such information and belief, these respondents aver that they are such true owners. These defendants have no knowledge or information as to the purpose of the said Turner and Welburn in making themselves parties to said action, and, therefore, hold the plaintiff to strict proof of the allegation that their purpose was to effect a repudiation of said bond.

Further answering the said last-named paragraph of the bill of complaint, respondents say that the said Clarence Call, after the expiration of his term of office as sheriff, being still *ex officio* treasurer of Wilkes county, appear*ing* before two of these respondents, to wit: Leander Jennings and William Barlow, in the absence of the chairman of the board, John T. Peden, at a meeting held soon after their induction into office, and exhibited the execution for the costs of the said appeal to the supreme court of North Carolina, and insisted that the said judgment was against him, Call, as well as against said Turner and Welburn, and insisted that it was the duty of the respondent board to pay said execution, and the said Call insisted, among other things that he, as treasurer, was a party to said action, that it was the duty of the commissioners to hold him harmless, and that he had the promise of the old board that he would be subjected to no costs, and that he had paid the bill of costs presented, and demanded credit for said payment on the settlement which he was then making, and, thereupon, the two respondents above named, under a mistake as to their official duty, and not through any wrongful or collusive purpose, consented to allow the amount of the said superior court judgment which had been
31 theretofore paid by said Call, to be a credit in his favor in said settlement with him as sheriff and tax collector, and respondents understood their counsel to assent to the allowance of said credit.

17.

Answering section 17 of the bill of complaint, these respondents say that it is true, according to their information and belief, that the said Turner and Welburn have sued out a writ of error to the Supreme Court of the United States, but it is not true that these respondents have entered into any agreement with the said Turner and Welborn to pay the costs of suing out the said writ of error out of the county funds as alleged, and these respondents have no knowl-

edge or information sufficient to form a belief as to the making of any agreement by their said predecessors in office to pay any such costs.

Further answering said section of the bill of complaint, these respondents say that it is a matter of law for the court to determine whether there is a Federal question involved in such appeal, and respondents are advised that all judges of the circuit court of the United States are not only willing but anxious to be anticipated in passing upon controversies by a court whose adjudications are the supreme law of the land and are more than willing that the law's delays should be prevented by such speedy adjudication.

18, 19.

That these respondents admit that the Northwestern North Carolina Railroad Company was chartered by the constitutional convention of North Carolina in 1868, as alleged in complaint.

20.

That those respondents have no knowledge or information sufficient to form a belief as to the time when the Northwestern North Carolina Railroad Company was organized, and therefore hold the complainants to strict proof as to the allegation that said company was organized April 16th, 1868.

21.

Answering the section of the bill of complaint mentioned 21 in the copy of the bill of complaint served on them, these re-
32 spondents say that neither the act ratified ont he 11th day of August, 1868, nor the act ratified on the 18th day of February, 1879, nor the act of March 2, 1881, mentioned in the said section of the complaint, were enacted in the manner prescribed by section 14, article 2 of the constitution of North Carolina, and every one of the said acts is null and void by reason thereof, and constitutes no authority for the issue of said bonds. The said ordinance of the convention of 1868 is not re-enacted or ratified or confirmed by said void act, because of said defect in the manner of its enactment, and the said original charter fails to confer the authority to create such bonded debt, because it was not supplemented by the enactment of any valid, enabling act as an amendment to said original charter, as these respondents are advised by counsel. Further answering said section, these respondents say that the sections of the code attached to the bill of complaint and marked Exhibits B. G. D and E do not constitute lawful authority for issuing said bonds, because said statutes are not local and special, as required by sections 1, 6 and 7 of article 5 of the constitution of North Carolina, and are insufficient as authority for issuing said bonds, and respondents say further that said sections of code failed to authorize the issue of said bonds, because said Northwestern North Carolina railroad was not within the meaning and proper construction of section 1996 of the code, one in which the citizens of the county of Wilkes had an in-

terest, nor was the subscription made necessary to aid in the completion of the same.

Further answering said section, these respondents aver the said bonds each contained a recital upon its face (as will appear from an inspection of Exhibit F, attached to complaint) that the said bonds were issued by virtue of authority conferred by the act of February 20th, 1879, which is for the reason aforesaid null and void and no law. These respondents, therefore, aver and plead that, as they are advised, the complainants are estopped from claiming that they were issued by any other authority or pretended authority than the said void statute.

22.

These respondents, still denying the authority of the former commissioners to issue bonds or subscribe to the capital stock to the said company, admit that they did subscribe and issue bonds in the amounts alleged in the complaint, and that it was ascertained and declared that a majority of the qualified voters of Wilkes county had voted in favor of making such subscription and that it is now too late to question said finding as to said vote.

33

23.

These respondents admit that the said company issued certificates, as alleged, of stock to the county of Wilkes, but aver that, according to their best information and belief, the franchise and property of the said company were heavily mortgaged for the completion of the road to Wilkesboro, and from the date of said certificate of stock, and the said mortgages were foreclosed, as alleged in the complaint. Further answering said section, respondents are advised that it is not material that they should give their opinion as to what the county of Wilkes long desired, if it can be truly said of a municipal corporation that it is capable of desiring improvements.

24.

Section 24 of the complaint is admitted to be true.

25.

That respondents have no knowledge or information sufficient to form a belief as to the truth of the allegation contained in section 25 of the complaint, and, therefore, hold the complainants to strict proof.

25*a*.

Answering the section of the complaint mentioned in the copy served on these respondents as 25*a*, these respondents say that the questions involved in this controversy were not adjudicated either in the case of Hill *vs.* Commissioners of Forsythe County, 67 N. C., 367, nor in Belo *vs.* Commissioners, 76 N. C., 489, for the reasons:

1st. That the contract of subscription between the said county of Forsythe and the North Western North Carolina Railroad Company was a completed contract before the ratification of the said constitu-

tion of 1868 on the 24th day of April, 1868, and no enabling act was necessary under restrictive clauses of said constitution not then in force.

2nd. Because it did not appear in evidence on the trials of said cases that the said act of August 11th 1868, had not been passed in accordance with the requirements of the constitution, section 14, article 2, and was, therefore void. Further answering said section, these respondents say, that, as they are advised by counsel, neither the payment of interest on these bonds by the county of Wilkes nor the acknowledgement of its governing authorities, the commissioners, was sufficient to impart validity to bonds for want of
34 authority to issue them or to relieve the purchasers of the duty of looking to the authority under which they were issued.

These respondents especially deny that, as they were advised by counsel, there was any adjudication or decision in the supreme court of North Carolina construing the constitution and statutes of said State so as to create a rule of property before said bonds were issued in the year 1889, which can be invoked, notwithstanding the later decisions of said court, but, as they are advised, the allegations that there were any such decisions contained in said section, are not true.

26.

That it is true that John H. Johnson is the present sheriff and that Clarence Call is treasurer until September 1898, by reason of having received the tax-lists of 1898 before said Johnson was elected and qualified as sheriff, and it is admitted that an action has been brought by these respondents against the said Call and his sureties upon his official bond to recover not only a portion of the said tax fund levied to meet the interest on said bonds, but also the general tax. Further answering the said section, these respondents say that they are informed and believe and advised by counsel that one J. Gordon Hackett had been appointed by virtue of an order in the said action carried as aforesaid by a writ of error to the Supreme Court of the United States and receiver was ordered to take charge of all of the said fund collected by virtue of such levy to meet the interest of the said bonds, and had qualified as such receiver before the bill of complaint was filed in this cause, and respondents are advised that this court has no jurisdiction of the said fund, has no authority to make any order as to the jurisdiction of the same since it was in contemplation of law, in custody of the superior court of Wilkes county before this suit was brought.

27.

That respondent are advised that the question whether the complainants are entitled to the relief demanded in section 27 of the complaint is one of law, and, under advice of counsel, respondents deny the right of complainants to such relief.

28.

Further answering, the bill of complaint, these respondents say that they have acted in reference to said bonds and the tax levied for their payment in perfect good faith, and, in order to pro-
35 tect all parties, had entered upon their minutes before the bringing of this suit an order forbidding the defendant, Johnson, *ex officio* treasurer of Wilkes county, from paying out any portion of the said fund collected under the levy to meet the interest on said bonds, as aforesaid, and that said Johnson, treasurer, has now in his hands about seven thousand one hundred dollars of said fund.

A. C. AVERY.
T. J. DULA.
FINLEY & GREEN.

W. F. Barlow, a member of the respondent board of commissioners, being duly sworn, maketh oath that the facts stated in the foregoing answer, as of his own knowledge, are true and that those facts stated therein on information and belief, he believes to be true.

W. F. BARLOW.

Sworn to and subscribed before me this the 3rd of April, A. D. 1899, as witness my hand and official seal.

[SEAL.] L. BUMGARNER, *C. S. C.*,
By H. T. SMOOK, *D. C.*

Endorsed: Filed in this office April 18th, 1899. Sam'l L. Trogdon, clerk.

Supplemental Answer of the Board of Commissioners of Wilkes County.

UNITED STATES OF AMERICA:

In the United States Circuit Court, Western District of North Carolina.

W. N. COLER, W. N. COLER, JR., BIRD S. COLER, JAMES W. Campbell, and Francis B. Coler, under the Name and Style of W. N. Coler & Company, Complainants,

versus

THE BOARD OF COMMISSIONERS OF WILKES COUNTY and CLARENCE Call, ex-Sheriff & *ex Officio* & ex-Treasurer, and John H. Johnson, Sheriff and Treasurer *ex Officio* of Wilkes Co., Respondents.

The defendants The Board of Commissioners of Wilkes
36 County, now, and at all times hereafter, saving to themselves all and all manner of benefit or advantage of exceptions or otherwise that can or may be had or taken to the many errors, uncertainties and the imperfections in the said bill contained, for further answer thereto, or to so much thereof as these defendants are advised is material or necessary for them to make answer to, answering, in addition to the answer hereto verified but filed at the hearing with this supplement, says:

1.

Further answering the said bill of complaint, this defendant says that it is informed and believes that the action entitled "The Board of Commissioners of Wilkes County and C. C. Wright *versus* Clarence Call and others" referred to in the bill of complaint as having been adjudicated in the supreme court of North Carolina, had before the filing of the said bill been carried by writ of error to the Supreme Court of the United States, — has since held that the Federal courts are bound to follow the adjudications of the State courts in that case, and affiant is advised by counsel that if such has been — adjudication of said court the holders of one of the bonds in controversy having been parties to said action, the question involved in this cause and set forth in the bill of complaint as the plaintiff's ground of complaint having been adjudicated, *and* the plaintiffs are estopped from denying that the bonds in controversy are invalid for want of authority in the said board of commissioners to issue them, and this defendant is further advised, informed and believes that after said action had been carried by writ of error to the said Supreme Court, and while it was there pending the superior court of Wilkes county, in the exercise of its rightful jurisdiction, and to the end that the fund mentioned in the bill of complaint as collected under a special levy to meet the interest on the bonds in controversy and as being in the hands either of the defendant Call or the defendant Johnson be protected and preserved to await the orders of the court to be made in pursuance of the adjudication of the Supreme Court of the United States, made, upon petition in said action, an order, which was signed by Starbuck, resident judge of the judicial district in which Wilkes county is situated, and having rightful jurisdiction in the premises, by which order it was adjudged that Gordon Hackett *the* appointed receiver to take charge of and hold under the direction of said superior court all funds that might be collected by the tax collector of Wilkes county as a special tax to meet the interest on said bonds. (A copy of the record in said case, including said order appointing a receiver, is hereto attached marked Exhibit K.)

37 2.

And this defendant is advised, informed and believes that, upon the making of said order, the said superior court acquired jurisdiction to appoint a receiver and to control the said fund as collected, and to hold the same subject to the action of said higher court, and this defendant, therefore, being so advised, specially avers and pleads that this court has no jurisdiction to appoint a receiver, because the said court, which is one of concurrent jurisdiction, had already assumed control of the said fund before the bill of complaint was filed.

And this defendant is further advised, informed and believes the question- and issues involved in this controversy and set up as a cause of action, or the grounds of the suit in the bill of complaint, has already been adjudicated finally by the Supreme Court of the

United States upon the hearing on the said writ of error, in which action the holders of one of said bonds had made themselves parties and had invited all other holders of said bonds to join them as parties defendants, and that said adjudication has been made since the same bill of complaint was filed, and this defendant specially avers and pleads that the plaintiffs are estopped by the said adjudication and will be finally estopped by the rendition of a final judgment in the superior court of Wilkes county upon the coming down of the certificate therein, and this defendant prays the court to continue the case until the coming down of said certificate, to the end that he may be enabled to properly plead as a defense that the questions and issues involved in this controversy have been so finally adjudicated and that the plaintiffs are estopped.

3.

Further answering the said bill of complaint, this defendant says that it is advised, informed and believes that the bonds in controversy were issued and the debt apparently evidenced thereby was created without authority of law by the predecessor in office of the present board of commissioners of Wilkes county — is involved, and this defendant is ready to surrender and orders a surrender of the certificates of stock issued to it by the North Western North Carolina Railroad Company, which has always been worthless, because of a mortgage executed contemporaneously with its issues.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith *he* is by the said bill
38 charged, without this, that there is any other matter, cause, or thing, in the said plaintiff's said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove, as this honorable court shall direct, and humbly prays to be hence dismissed with *his* reasonable costs and charges in this behalf most wrongfully sustained.

A. C. AVERY,
T. J. DULA,
FINLEY & GREEN,
Attorneys.

L. C. Jennings, being duly sworn, maketh oath that he is a member of the board of county commissioners of Wilkes county, and that the facts stated in the foregoing answer, as of his own knowledge, are true, and those facts stated on information and belief, he believes to be true.

L. C. JENNINGS.

Sworn to and subs ribed before me this, the 12th day of April, 1899, as witness my hand and seal of office.

[SEAL.] ERNEST CLAPP,
Deputy Clerk Superior Court.

Endorsed: Filed April 12th, 1899, by leave of the court as a supplement to the answer.

Exhibit K to Supplemental Answer, Transcript of Record from Supr. Court of Wilkes Co.

THE BOARD OF COMMISSIONERS OF WILKES County and C. C. Wright *against* CLARENCE CALL, Sheriff and *ex Officio* Treasurer of Wilkes County. } No. 338. From Wilkes.

Agreement of parties.

It is agreed that in addition to the pleadings, and exhibits, and affidavits offered at the former hearing, the original charter of the Northwestern North Carolina Railroad Company passed by
39 the constitutional convention of 1868, and all amendments thereto, including the amendatory acts of 1879 and 1881, shall be considered in evidence, and that the amendments passed in 1879 and 1881, purporting to give to counties authority to submit the question of subscription to the capital stock of the company, were not passed by the house of representatives in accordance with the requirements of the constitution, and the certified exhibits from the journals of said sessions need not be offered or sent up as a part of the testimony.

It is agreed that the only legislation that is relied upon to give such authority is the original charter, passed as an ordinance of the constitutional convention of 1868, and the general statute enacted in 1868 as chapter —, being in the same language as contained in the code, sections 1996 to 2000, both inclusive.

It is further agreed that the plaintiff still objects to the testimony offered for the defendant, Call, on the former hearing, to show when the Northwestern North Carolina Railroad Company was organized or incorporated.

(Signed) A. C. AVERY,
Attorney for Plaintiffs.

(Signed) RICHARD N. HACKETT,
Attorney for Defendants, J. M. Turner and J. M. Wellborn.

Summons.

To the coroner of Wilkes county, Greeting:

You are hereby commanded to summon Clarence Call, sheriff and *ex officio* treasurer of Wilkes county, the defendant above named, if he be found in your county, to be and appear before the judge of our superior court at a court to be held in the county of Wilkes, at the court-house in Wilkesboro, on the first Monday after the fourth Monday of February, it being the 7th day of March, 1898, and answer the complaint which will be deposited in the office of the

clerk of the superior court of said county within the first three days of said term; and let the said defendant take notice that, if he fail to answer the said complaint within the time required by law, the plaintiff will apply to the court for the relief demanded in the complaint.

Hereof fail not, and of this summons make due return.

Given under my hand and seal of said court, this 23rd day of December, 1897.

(Signed) A. M. VANNOY,
Clerk Superior Court.

40 We acknowledge ourselves bound unto Clarence Call, sheriff and *ex officio* treasurer of Wilkes county, the defendant in this action, in the sum of two hundred dollars to be void, however, if the plaintiffs, The Board of Commissioners of Wilkes County, and C. C. Wright, shall pay to the defendant all such costs as the defendant may recover of the plaintiff in this action.

Witness our hands and seals this 23rd day of December, 1897.

(Signed) C. C. WRIGHT. [SEAL.]
Chairman pro Tem.
(Signed) R. A. SPAINHOUR. [SEAL.]

Bonds.

We, the undersigned, acknowledge ourselves indebted to the defendant in the above-entitled order in the sum of two hundred dollars, to be void on condition that the plaintiffs in said action will pay to said defendant such damage, not exceeding said sum of two hundred dollars, as said defendant may sustain by reason of the injunction granted them, if the court shall finally decide that the plaintiffs was not entitled thereto.

In witness whereof we have hereunto set our hand and affixed our seal this the 5th day of January, 1898.

THE BOARD OF COUNTY COMMISSIONERS OF WILKES COUNTY,
By C. C. WRIGHT, *Chairman pro Tem.*
(Signed) C. C. WRIGHT. [SEAL.]
(Signed) R. A. SPAINHOUR. [SEAL.]

R. A. Spainhour, surety to the foregoing undertaking, maketh oath before me that he has property over and above his homestead and personal property exemptions, and all other liabilities, worth the sum of two hundred dollars, the amount mentioned in said undertaking.

(Signed) R. A. SPAINHOUR.

Sworn to and subscribed before me this 5th day of January, 1898; and I hereby affirm the surety to the undertaking, and adjudge it sufficient.

(Signed) A. M. VANNOY, *Clerk.*

41 *Complaint.*

The plaintiffs complain and allege:

1. That P. A. Lomax is chairman of the board of county commissioners of Wilkes county, and that W. C. Myers, C. C. Wright, A. M. Church, and R. P. Yates are county commissioners, *an* act with said chairman in discharging the duties as such of the plaintiff board; and that the plaintiff, C. C. Wright, is a resident citizen and tax-payer of the county of Wilkes.

2. That the defendant, Clarence Call, is sheriff, and by virtue of statutes so providing, has been made an *ex officio* treasurer of the county of Wilkes, and is charged with the duty of receiving and disbursing the moneys of said county.

3. That the Northwestern North Carolina railroad was duly incorporated and organized under an ordinance of the constitutional convention of 1868, which was published as chapter 17 of the constitution and ordinances and resolutions of the constitutional convention of 1868.

4. That the General Assembly at its session of 1869–1870, passed an act (which was published as chapter 100 of the Laws of *laws of* 1869 and 1870), by the terms of which act it was provided that the State of North Carolina might loan to the said railroad company its bonds, if secured by mortgage deeds, conveying the franchise and property of said company, the said bonds to be furnished in installments, as the grading of the line of said railroad should progress; and it was further provided by said act that all acts of the General Assembly theretofore passed, authorizing the issuing of bonds to the State to aid in the completion of the First division as a subscription to the capital stock of said company be repealed; and the General Assembly of North Carolina, at its session of 1870–1871, passed an act which is entitled "An act to enable the Northwestern North Carolina Railroad Company to complete their road to Salem" (which is published as chapter 178 of the Laws of 1870–1871), by the terms of which said act the said company was authorized to consolidate with any other company whose line was then built, or to be built and connected with its line, providing such company should agree and contract to finish the line of the Northwestern North Carolina railroad from Greensboro to Salem.

42 5. That no authority was granted by the State or purported to be granted by the terms of said original charter, or of any of the amendments thereto, hereinbefore mentioned, to any county in the State of North Carolina to subscribe to the capital stock of said company or to create any indebtedness, upon any terms or conditions, in order to aid in the completion of the line of said company.

6. That the General Assembly, at its session of 1871–1872, passed an act (published as charter 25 of the Laws of 1871–1872), entitled "An act to amend the charter of the Northwestern North Carolina railroad and for other purposes;" and also at the same session passed another act (which is published as chapter 47 of the Laws of

1871–1872), entitled "An act supplementary to an act entitled An act to amend the charter of the Northwestern North Carolina Railroad Company," and for other purposes, by the terms of which act it was provided that, upon the acceptance of the amendment of the charter of the said company, the mortgages theretofore executed by said company to the State of North Carolina, to secure loans to said company, should be cancelled; and thereafter the Northwestern North Carolina Railroad Company should be authorized to issue bonds of the company and execute a mortgage deed upon its franchise and property to secure the payment of the principal and interest upon said bonds as they shall fall due. All of said enactments hereinbefore mentioned, as passed by the General Assembly, were duly accepted by the Northwestern North Carolina Railroad Company as amendments to its charter, and became parts thereof; and after their acceptance the State of North Carolina no longer had any interest in the said company, nor did any county in said State, or the citizens of any such county, have any pecuniary interest in said company.

7. That the General Assembly of North Carolina at its session of 1872–1873, passed an act (published as chapter 140 of the Laws of 1872–1873), which so amended the charter of the said company as to authorize subscription to its capital stock to be paid in real estate; but that no amendment to the charter of said company, and no other statute passed by the General Assembly of the State of North Carolina prior to the 20th day of February, A. D. 1879, granted or purported to grant authority to any county to subscribe to the capital stock of the said Northwestern North Carolina Railroad Company; and that prior to the said 20th day of February the said company was not authorized to build any line of railroad, except that extending from the town of Greensboro, in Guilford county, to the town of Winston, in Forsyth county, or to extend its line of railroad to or into the county of Wilkes.

43 8. That the General Assembly, at its session of 1879, passed an act (published as chapter 43 of the Laws of 1879), entitled An act to amend the charter of the Northwestern North Carolina Railroad Company, for the construction of a Second division from the town of Winston-Salem, in Forsyth county, by the Yadkin valley in Wilkesboro, to Patterson's factory, Caldwell county. It was provided in the first section of said act that the said company should be authorized and empowered to extend its line by way of Jonesboro and Wilkesboro, in the county of Wilkes, to Patterson's factory, in the county of Caldwell; and section 4 of said act purported to authorize any county in the State of North Carolina to subscribe to the capital stock of said company, when so authorized to do by a vote of the qualified voters of said county; but the said act, in so far as it purported to give such authority, was unconstitutional, null and void, because, when the said act was read the second time and put upon its passage on its second reading in the house of representatives of the General Assembly of North Carolina, there was no call of the ayes and noes, and the vote upon

such reading was not recorded in the Journal of the House of Representatives, as required by the constitution of North Carolina.

9. That subsequent to the enactment of the last-named act, of the 20th day of February, 1879, the board of commissioners of Wilkes county ordered an election under the provisions of section 4 of said act, which, as the plaintiffs are advised, was null and void (a full transcript of all the proceedings of the board of commissioners of Wilkes county in relation to said election, and to the subscription of the capital stock of the Northwestern North Carolina Railroad Company, which it is claimed was authorized by said vote, being hereto attached, marked Exhibit "A," except that the names of judges of election are omitted, as well as the statement of the vote by townships. It is admitted that at said election a majority of the qualified voters of Wilkes county voted a ticket, whereon was written or printed the word "Railroad.") The plaintiffs are advised and believe that there was no authority for holding said election for the purpose of authorizing such subscription as held then other than that purporting to be granted by section 4, chapter 43 of the Laws of 1879, which, for the reason hereinbefore stated, was null and void.

10. That after said election was held, as aforesaid, the said North Western North Carolina Railroad Company abandoned its claim to demand a subscription from the plaintiff or the county of
44 Wilkes, conceding that said election was held without authority; and that, if authorized, the said railroad company had forfeited its right to demand that board of commissioners of Wilkes county should subscribe to its capital stock, by failure to comply with the conditions upon which said subscription was made.

11. That on the 8th day of October, 1888, a petition was presented to the board of commissioners of the county of Wilkes, asking that another election be ordered, to pass upon the question whether said company should subscribe one hundred thousand dollars to the capital stock of the Northwestern North Carolina Railroad Company; and in response to said petition, an election was accordingly ordered and held on the 6th day of November, 1888, at which election a majority of the qualified voters of Wilkes county voted tickets whereon was written or printed "Subscription." A full transcript of all proceedings of the board of commissioners of Wilkes county, in relation to the authorizing and holding said election, and the declaring of the result, as well as the making of a subscription of one hundred thousand dollars in coupon bonds to the capital stock of said company, and the issue and delivery of said bonds to said company, is hereto attached, marked Exhibit "B." The plaintiffs admit that at the said election the majority of the qualified voters of Wilkes county cast their ballots in favor of the subscription of one hundred thousand dollars to the capital stock of said company. The plaintiffs are advised, informed and believe that no authority had been granted in sections 1900 to 2000, both inclusive, of the Code of North Carolina; and that neither the county of Wilkes nor the citizens of said county

had any pecuniary interest or interest in contemplation of law in the said railroad company at the time that said election was held; and plaintiffs are therefore advised, informed and believe that the said subscription of one hundred thousand dollars, purporting to have been made by the board of commissioners of Wilkes county, was unauthorized; and that the coupon bonds, amounting to one hundred thousand dollars, issued under the color of authority, claimed to be given by said sections of the Code and said election, are invalid, null and void.

12. That accordingly, as appears more fully in the orders embodied in Exhibit "B," hereto attached, in pursuance of a contract, bearing date October 1, 1888, the board of commissioners of Wilkes county caused the said bonds first thirty-three thousand dollars, according to the face value of the same, and subsequently the remaining sixty-seven thousand dollars, to be delivered
45 to the president of said Northwestern North Carolina Railroad Company, reciting upon the face of said bonds that they were issued by virtue of an election held in accordance with the provisions of said sections of the Code of North Carolina; and since the issuing of said bonds the commissioners of said county have annually levied a tax to meet the interest on the same as it accrued; and out of the money derived from said special levy have caused the said interest to be paid, and have taken up the coupons attached to said bonds, said bonds were each (omitting the coupons attached) in form as set forth in a paper hereto attached, marked Exhibit No. 1.

13. That there is now, or ought to be, in the hands of the defendant, Clarence Call, as treasurer of said county about — dollars of the funds levied and collected for the purpose of paying the interest on said bonds; and that the said Call, as sheriff, has collected and has or ought to have turned over to himself as treasurer the moneys levied for the purpose of meeting the interest on said bonds as it may fall due.

14. That the defendant, Clarence Call, in his capacity as treasurer, has been in the habit of paying the interest on said bonds, and taking up the coupons as such interest fell due, without awaiting the orders or direction of the plaintiff board. That, as plaintiffs are advised, informed, and believe, the said Call recently communicated with some of the holders of the bonds and advised them to deliver their coupons and receive the interest from him, lest some proceeding might be instituted to enjoin its payment; and the plaintiffs are informed and believe that the said Call will continue to apply the funds given into his hands under said levy as sheriff, and turn over to himself, in the capacity of treasurer, in payment of the interest on said bonds, unless restrained from doing so by the order of some court of competent jurists; the plaintiffs are advised, informed, and believe that if the said Call, as treasurer, shall apply said moneys in his hands to the payment of said interest, although said bonds may be in contemplation of law invalid, neither the said Call nor the sureties on his official bond, as treasurer, can be held accountable for such application of said moneys,

and, therefore, the plaintiffs will suffer irreparable damage, unless he shall be restrained from making said payments.

Wherefore plaintiffs demand judgment:

1. That the said coupon bonds, amounting to one hundred
46 thousand dollars, purporting to have been issued by virtue of a vote in favor of subscription by a majority of the qualified voters in Wilkes county be declared invalid, null and void.

2. That defendant, Clarence Call, as *ex officio* treasurer of the county of Wilkes, be perpetually enjoined and restrained from paying any portion of the principal or interest on the said bonds issued by the board of commissioners of Wilkes county in payment of a subscription to the Northwestern North Carolina Railroad Company.

3. For such other and further relief as to the court may seem just.

4. For the cost of action.

(Signed) A. C. AVERY, *Attorney.*

C. C. Wright maketh oath before me that the facts set forth in the foregoing affidavit or complaint, as of his own knowledge, are true; and those stated on information and belief he believes to be true.

(Signed) C. C. WRIGHT.

Sworn and subscribed before me, this the 31st day of December, 1897.

WILL P. RAGAN,
Notary Public.

EXHIBIT "A."

Whereas, a petition in accordance with law has been presented to us, asking that an election be ordered in the county of Wilkes, on the 16th day of June, 1887, for the purpose of submitting to the people a proposition to subscribe one hundred thousand dollars to the capital stock of the Northwestern North Carolina railroad.

It is now ordered by us, the county commissioners of Wilkes county, that an election be held on the said 16th day of June, 1887; and that a vote be taken in the county of Wilkes as to whether they will subscribe one hundred thousand dollars to the capital stock of the railroad aforesaid.

It is further ordered, in accordance with the proposition submitted to us by the Richmond and Danville Railroad Company for the extension of the Northwestern North Carolina railroad, that in case that a majority of the qualified voters of Wilkes county shall vote for said subscription, the commissioners shall issue bonds payable at the Wachovia National Bank, of Winston, N. C., due not less than ten,
nor more than forty years (as to the commissioners seems best),
47 after date, said bonds bearing interest at six per cent. per annum, payable semi-annually, said bonds to be placed in the hands of a trustee, to be selected by the commissioners, and one-third of the bonds to be delivered to the railroad authorities when the road is completed and the cars running to a point one-half of the distance between Wilkesboro, in Wilkes county, and Elkin, in

Surry county; and the remaining two-thirds of the bonds, on the completion of the road and the running of the trains to the town of Wilkesboro (or a point just across the river), said bonds to be in denominations of not less than one thousand dollars nor more than five thousand dollars, interest to be paid on said bonds only from the time of delivery.

It is further ordered, in accordance with the provisions submitted to the commissioners by the Richmond and Danville Railroad Co. the railroad Co. must commence work in the county of Wilkes in ninety days after the subscription is voted, and shall continue said work until said road shall be completed, which shall be in eighteen months thereafter; and upon the failure of said road to commence work in ninety days, or to complete their line from Wilkesboro to Winston in eighteen months, as above set forth, then said subscription to said road is to be null and void, and the railroad company shall have no right to demand the bonds issued by the county, but the trustee, in whose hands the bonds are, shall deliver them up to the county commissioners, to be cancelled upon the bonds being issued and delivered, (the Northwestern North Carolina Railroad Co.), shall issue to the county of Wilkes certificate of stock to the amount of one hundred thousand dollars in the capital stock of the Northwestern North Carolina Railroad Company. The said election shall be held under the same provisions, laws and regulations as in the case of the regular State and county elections.

The above order is made at the request of the Richmond and Danville railroad, and with their full concurrence.

(Signed) R. B. GLENN,
Attorney for R. & D. R. R. Co.

Whereas, the Richmond and Danville Railroad Company has made a proposition to the county commissioners of Wilkes county to extend the Northwestern North Carolina railroad from Winston, N. C., to Wilkesboro, N. C., in the event that Wilkes county will subscribe one hundred thousand dollars to the capital stock of the said company, to be paid in bonds of said county according to agreement filed in the office of register of deeds, which
48 appears of record in the minutes of the meeting of our board, one-third of said bonds to be delivered to said railroad company when said railroad is completed to a point half way between Elkin, N. C., and Wilkesboro, N. C., and the remaining two-thirds to be delivered to said railroad company when the railroad is completed to Wilkesboro, N. C., or a point just opposite said town, as expressed in said agreement.

Now, therefore, in pursuance of the agreement filed, and in accordance with the stipulation therein contained, we do hereby subscribe one hundred thousand dollars to the capital stock of said company, according to the stipulations of said agreement, subject to the will of the qualified voters of Wilkes county; and to ascertain the same of said voters, an election is hereby ordered to be held at the various precincts of said county, on the 16th day of June, 1887, at which election to be held under the laws and regulations

of general county and State elections. Those favoring said subscription shall vote a written or printed ticket with the word "Railroad;" and those opposing, like tickets with the words "No railroad." And the following are appointed registrars and judges of said election in the various townships, and the register of deeds will issue notice to each.

Ordered by the board, that the registrars and judges of said election meet at the voting precincts of their respective townships on Saturday before said election and revise the registration books, and make report of the same to the board.

Commissioners' Court, June 16, 1887.

Telegram from A. B. Andrews to R. B. Glenn, attorney for Richmond and Danville Railroad Company, as follows:

RALEIGH, *June* 1, 1887.

Received at Winston, June 1st.

To R. B. Glenn:

I learn that it has been said by some parties of Wilkes county that the proposition that you made as our attorney, to extend the Northwestern North Carolina railroad, was not binding on us, as it was made by you as attorney. I hereby confirm your action, and the proposition is binding on the company.

A. B. ANDREWS.

49 NORTH CAROLINA, }
Wilkes County. }

The board of county canvassers for said county, having canvassed and judicially determined the original returns of the election in the several precincts in the county, June 16, 1887, on the question of subscribing one hundred thousand dollars to the capital stock of the Northwestern North Carolina Railroad Company, I do hereby certify, as chairman of said board, that it appears to be three thousand, seven hundred and thirty-eight registered voters of said county, and that two thousand eight hundred and ninety-five votes cast in favor of "Railroad," and fifty-nine votes cast "No railroad," and one vote cast against subscription; and as chairman of said board of canvassers do declare that a majority of the qualified voters having voted in favor of said subscription, that the same has been ratified by the voters of said county.

June 18, 1887.

(Signed) L. D. BURCHAM,
Chm. Board of Co. Canvassers.

STATE OF NORTH CAROLINA, }
Wilkes County. }

Commissioners' Court, July Term, 1887.

Whereas, an election was duly held in Wilkes county on the 16th day of June, 1887, in accordance with an order previously made by

the board of county commissioners, for the purpose of submitting to the qualified voters of Wilkes county a proposition to subscribe one hundred thousand dollars to the capital stock of the Northwestern North Carolina Railroad Company; and, whereas, it appears to us from the returns of the election (held in the county of Wilkes at the time aforesaid) that a majority of the qualified voters of Wilkes county voted in favor of railroad, which vote was duly declared and adjudged correct by the board of county canvassers, and the same properly reported to us. And it appears to us that a majority of the qualified voters were in favor of said proposition:

Now, therefore, we, the board of county commissioners of Wilkes county, by authority of the power invested in us by law, do hereby subscribe on our books to the capital stock of the Northwestern North Carolina Railroad Company the sum of one hundred thousand dollars, under the limitations and conditions as contained in the proposition of the company. And do hereby appoint, empower and commission W. H. H. Cowles, of Wilkes county, as our
50 legal and authorized agent and proxy for us, and in our stead, and for the county to subscribe on the books of the Northwestern North Carolina Railroad Company the said sum of one hundred thousand dollars, to be paid on the conditions of the completion of said road, as expressed in the proposition of the railroad company, as hereinafter set forth.

We further order that bonds with coupons in sums not less than one thousand dollars nor more than five thousand *b*ollars, payable not less than ten nor more than forty years after date (the amount of the bonds and the time they are to run to be hereafter agreed upon between us and the railroad company), with interest at six per cent., semi-annually (the bonds to be on interest only from time of their delivery), be prepared to be issued and signed by us.

We further order and adjudge Jesse T. Ferguson is to receive said bonds when issued, and to hold the same in trust, and to deliver one-third of said bonds to the railroad authorities when the railroad is completed and the trains running to a point half way between Elkin, in Surry county, and Wilkesboro, in Wilkes county, and the other two-thirds of the bonds to be delivered when the railroad is completed and the cars running to Wilkesboro, or a point just across the river and opposite said town.

And in case of a failure of the Richmond and Danville Railroad Company to complete the Northwestern North Carolina railroad, as heretofore agreed upon between them and the county of Wilkes, then said trustee must surrender up all the bonds in his hands to us to be cancelled.

It is further ordered, that for the purpose of meeting the interest on said bonds and the principal when it falls due, the county commissioners shall have power each year to levy and correct a sufficient amount of taxes for the purpose required.

It is further ordered, that before the trustee shall deliver one-third of the bonds, the Northwestern North Carolina Railroad Company shall issue to the county of Wilkes thirty-three and one-third thousand dollars' worth of stock in their railroad; and when the

other two-thirds of the bonds are delivered the said railroad company shall issue sixty-six and two-thirds thousand dollars' worth of stock to said county.

RUFUS W. COLVARD,
Chairman Board of Commissioners.
J. A. COOPER,
County Commissioner.
J. S. HOLBROOK,
County Commissioner.

51 EXHIBIT "B."

Whereas a petition in accordance with law has been presented us, asking that an election be ordered in the county of Wilkes on the 6th day of November, 1888, for the purpose of submitting to the people the proposition to subscribe one hundred thousand dollars, payable in Wilkes County bonds, to the capital stock of the Northwestern North Carolina Railroad Co., it is now ordered by us, the commissioners of Wilkes county, that an election be held the 6th day of November, 1888, and that a vote be taken at the different precincts in the county of Wilkes as to whether they will subscribe one hundred thousand dollars to the capital stock of the railroad aforesaid. Those favoring said subscription voting a written or printed ticket with the word "Subscription." Those opposed, "No subscription."

It is further ordered, in accordance with the provision submitted to us by the Northwestern North Carolina Railroad Company for the extension of the Northwestern North Carolina railroad, that in case that a majority of the qualified voters of Wilkes county shall vote for said subscription the commissioners shall issue bonds payable to the Wachovia National Bank of Winston, N. C., to run not less than ten nor more than forty years (as the commissioners shall deem best) after date said bonds bearing interest at six per cent. per annum, payable semi-annually, said bonds to be placed in the hands of a trustee, to be selected by the commissioners, and one-third of the bonds to be delivered to the railroad authorities when the railroad is constructed and the cars running to a point one-half the distance between the Surry County line and Wilkesboro, in the county of Wilkes. And the remaining sixty-seven thousand dollars on completion of the road and the running of the train to the town of Wilkesboro or a point across the river, within one mile of the courthouse; said bonds to be in denominations of one thousand dollars each, interest to be paid on said bonds only from the time of their delivery.

It is further ordered, in accordance with the provisions submitted to the commissioners by the Northwestern North Carolina railroad, that the railroad company shall continue work on said road in the county of Wilkes until it shall have been completed, which shall be by the 16th of September, 1890. And, upon the failure of the said road to complete their line from Winston to Wilkesboro, as herein provided, then said subscription issued shall be null and void, and

the railroad company shall have no right to demand the un-
52 earned bonds issued by the county, but the trustee, in whose hands the bonds are, shall deliver them up to the county commissioners to be cancelled. And the said railroad company shall issue and deliver to the county of Wilkes, certificates of stock in the Northwestern North Carolina railroad to the amount of bonds received at the time of the delivery. The said election shall be held under the same provisions, laws and regulations as in the case of a regular State or county election. The above order is made at the request of the Northwestern North Carolina Railroad Company, and with their full concurrence.

Whereas, the Northwestern North Carolina Railroad Company have presented to the board of county commissioners of Wilkes county, a petition signed by the requisite numbers of citizens, asking the board of county commissioners of Wilkes county to subscribe one hundred thousand dollars to the capital stock of the Northwestern North Carolina Railroad Company; and at their regular meeting of said county commissioners of Wilkes county, held at the court-house in Wilkesboro, N. C., on the first Monday in October, 1888. and upon consideration of said petition, it is ordered by the board that one hundred thousand dollars be subscribed to said Northwestern North Carolina Railroad Company, subject, however, to be ratified by the qualified voters of Wilkes county, at an election to be held on the 6th day of November, 1888. And the Northwestern North Carolina Railroad Company, through A. B. Andrews, president of said company, covenants and agrees, to and with the said board of county commissioners of Wilkes county, to wit: R. W. Colvard, chairman; J. A. Cooper and J. S. Holbrook, that in case said Northwestern North Carolina Railroad Company do not comply with the terms of a certain order made at this court, to wit: that said railroad company agrees to construct and build a railroad from Winston, N. C., to Wilkesboro, N. C., and to have said road in running operation, properly equipped, to Wilkesboro, N. C., or to within one mile of the court-house, across the river, by the 16th day of September, 1890; that the said Northwestern North Carolina Railroad Company will forfeit and pay to said commissioners of Wilkes county, the sum of ten thousand dollars, provided that said subscription of one hundred thousand dollars shall be legally voted and subscribed to the capital stock of said railroad company. The ten thousand dollars forfeiture is to be placed in the Wachovia National Bank of Winston, N. C., to be held in trust for the use of Wilkes county, N. C., and to be turned over to the said county commissioners of Wilkes county, N. C., in case said Northwestern
53 North Carolina Railroad Company shall fail to complete said railroad, as hereinbefore stated. In case the depot be situated on the east side of Reddie's river, the railroad company obligates themselves to erect at their expense a good, substantial bridge over Reddie's river for the purpose of transporting teams, wagons, etc., and the said bridge to be built whenever the commissioners designate. The county commissioners obligate themselves to furnish a good public road to and from the said bridge to the depot. The

said bridge to be turned over to the county and to be kept forever afterwards as a public bridge; said bridge to be built within sixty days from the completion of the railroad to the point intended as a depot. It is expressly understood and agreed between the said county commissioners and the said railroad company that if a majority of the qualified voters of Wilkes county vote for the subscription of one hundred thousand dollars, as provided for in this election, to be held November 6, 1888, *is* subscribed by the county commissioners and ratified by the voters, then the obligations heretofore entered into with the Richmond and Danville Railroad Company shall be null and void, otherwise, it shall remain in full force till the expiration of time specified in the first agreement, made on May 3, 1887, with the Richmond and Danville Railroad Company.

R. W. COLVARD,
Chairman Board of Commissioners.
J. A. COOPER, *County Commissioner.*
J. S. HOLBROOK, *County Commissioner.*
NORTHWESTERN N. C. R. R. CO.,
By A. B. ANDREWS, *President.*

NORTH CAROLINA, }
Wilkes County, }

It appearing to the satisfaction of the board of county commissioners of Wilkes county according to the board of county canvassers, that there are four thousand one hundred and eighty-two qualified voters in Wilkes county, and that at the election ordered by us to be held on the 6th day of November, 1888, to subscribe "one hundred thousand dollars" to the capital stock of the Northwestern
54 North Carolina Railroad Company, two thousand seven hundred and sixty-two votes were cast for said propositions, according to the conditions, stipulation and agreements contained in said proposition; and this being a majority of the qualified voters in Wilkes county:

Now, therefore it is hereby adjudged by the board that said proposition is properly ratified according to said contracts and agreements heretofore entered into between said railroad company and this board.

APRIL 1, 1889.

Ordered by the board, that the one hundred thousand dollars subscribed to the Northwestern North Carolina Railroad Company at October term, 1888, at the commissioners' court of Wilkes county, and ratified by the voters of Wilkes county at an election ordered by and held November the 6th, 1888, be paid in bonds of the denominations of one thousand dollars each, bearing interest payable semi-annually, at the Wachovia National Bank of Winston, N. C., from the time of their delivery, as set forth in the agreement entered into between the commissioners of Wilkes county and A. B. Andrews, president of the Northwestern North Carolina Railroad Company, at October meeting, 1888, the principal of which bonds shall become due and payable as follows, to wit: three thousand dollars thereof

shall become due and payable eleven years after their delivery to the said Northwestern North Carolina Railroad Company, and five thousand thereof become due and payable each and every year thereafter, till the thirtieth year, there shall be paid the seven thousand dollars still remaining due.

It is further ordered by the board that R. W. Colvord is hereby authorized and empowered to contract with any company he may deem best to have properly lithographed the bonds which are to issue, with coupons attached, providing for the payment of said interest semi-annually, as set forth in the contract made at October term, 1888, of this court.

JUNE 2, 1889.

Whereas, on the 1st day of October, 1888, the board of commissioners of Wilkes county entered into a contract with the Northwrstern North Carolina Railroad Company to issue one hundred thousand dollars of county bonds to aid in the construction and extension of said Northwestern North Carolina railroad; and, whereas, the further condition of said contract provides that "one-third" of the bonds are to be delivered to said railroad authorities when
55 the railroad is constructed and the cars running to a point one-half the distance between the Surry County line and Wilkesboro, in the county of Wilkes; and it appearing to us by the affidavit of A. B. Andrews, president of the Northwestern North Carolina Railroad Company, and C. F. Botton, chief engineer of said company, that the above condition and provision has been complied with, and the board here finding as a fact that the same is true:

It is now ordered by the board of commissioners that thirty-three thousand dollars of bonds, face value, numbered from one to thirty-three (1 to 33), inclusive, be signed and delivered at once to said A. B. Andrews, president of the said Northwestern North Carolina Railroad Company, and take his receipt therefor.

It is understood and agreed here between the parties to the contract, all being present, that the interest on the bonds shall run only from the 1st day of June, 1890, but it is further agreed between the parties that before the delivery of said bonds that the board of commissioners may cut off from the first eleven bonds the coupons due October 1, 1890, leaving the October 1, 1890, coupons on the other twenty-two bonds, which will be the same as if the fractional part of the amount due on all the October coupons, 1890, were paid by the county at maturity.

And it is further ordered by the board of commissioners of Wilkes county that when said railroad shall be completed to Wilkesboro, or to a point within one mile as stipulated in the agreement, entered into between the board of commissioners of Wilkes county and the Northwestern North Carolina Railroad Company, at the meeting of said board on the 1st day of October, 1888, as aforesaid, and when the proper affidavits shall be filed as to said completion, according to the contract, then the chairman of this board is hereby directed to execute and sign the remaining sixty-seven thousand dollars of bonds, and deliver the same to A. B. Andrews, president of said

Northwestern North Carolina Railroad Company, and take his receipt for the same; and to receive from said A. B. Andrews, president, as aforesaid, the certificate of stock for Wilkes county.

It is further ordered by the board, that R. W. Colvard, chairman of the board, is authorized and empowered to agree with A. B. Andrews, president of the Northwestern North Carolina Railroad Company, as to what number of coupons are to be delivered in case said bonds are delivered at a time other than when said coupons are due, so that the matter of equitable adjusting the interest on said
56 bonds may be arranged *arranged* the county of Wilkes and said railroad authorities, said interest to run only from said completion of the railroad.

NORTH CAROLINA, }
Wilkes County. }

I, E. M. Blackburn, register of deeds for Wilkes county, do hereby certify that the foregoing is a true copy of the proceedings of the county commissioners of Wilkes county in reference to the Northwestern North Carolina Railroad Company, from May 3d, 1888, to December 31st, 1890, as appears on record in my office.

This February 14, 1898.

(Signed) E. M. BLACKBURN,
Register of Deeds.

EXHIBIT No. 1.

Six per Cent Bond.

(Copy.)

The County of Wilkes, State of North Carolina, is indebted to the bearer in the sum of one thousand dollars, lawful money of the United States, payable on the first day of October, 1913, with interest thereon from the first day of October, A. D. 1889, at six per cent. per annum, payable on the first days of April and October in each year, at Wachovia National Bank, of Winston, North Carolina, on presentation and surrender of the respective coupons hereto attached, as they severally become due and payable.

This bond is one of a series on one hundred bonds of the denomination of one thousand dollars each, issued by authority of an act of the General Assembly of North Carolina, ratified the 20th day of February, A. D., 1879, entitled "An act to amend the charter of the Northwestern North Carolina railroad for the construction of a Second division from the towns of Winston and Salem, in Forsyth county, up the Yadkin valley, by Wilkesboro, to Patterson's factory, Caldwell county," and authorized by a vote of a majority of the qualified voters of Wilkes county, by an election regularly held for that purpose on the 6th day of November, A. D., 1888, and by an order of the board of commissioners of Wilkes county made on the first day of April, A. D., 1889. This series of bonds is issued to pay the subscription of one hundred thousand dollars made to the capi-

tal stock of the Northwestern North Carolina Railroad Company by said county of Wilkes.

In witness whereof the chairman of the board of county commissioners and the clerk of the said board have hereunto subscribed their names, and the said clerk has affixed the seal
57 of said board of commissioners, this 1st day of October, A. D., 1889.

(Signed) R. W. COLVARD,
Ch'm'n Board of Commissioners of Wilkes Co.

(Signed) J. M. ADAMS,
[SEAL] *Clerk Board Commissioners Wilkes Co.*

Answer.

The defendant, Clarence Call, sheriff of Wilkes county, answering the complaint of the plaintiffs, says:

I. That the allegations of paragraph one of the complaint are true.

II. That the allegations of paragraph two of the complaint are true.

III. That the allegations of paragraph three of the complaint are true.

IV. That the allegations of paragraph four of the complaint are true.

V. That the allegations of paragraph five of the complaint are untrue, as he is advised.

VI. That the allegations of paragraph six of the complaint are untrue, in so far as it is alleged that, after the passage of the laws therein referred to, no county in the State, nor the citizens of any county in the State, had any pecuniary interest in said Northwestern North Carolina Railroad Company, but, on the contrary, the county of Forsyth, and the citizens of the county of Forsyth, and of other counties in the State, had stock in said Northwestern North Carolina Railroad Company, until the year 1895, when the road was sold to the Southern Railway Company.

VII. That the allegation that the General Assembly of North Carolina, at its session of 1872 and 1873, amended the charter of the Northwestern North Carolina Railroad Company is true, and it may be true, except as hereinafter stated, that no amendment of the charter of said company, prior to February 20th, 1879, granted authority to any county to subscribe stock to said road; but, the allegation that prior to February 20th, 1879, the county of Wilkes had no authority to subscribe stock to said company is, as this defendant is advised, untrue, and it is also untrue that this company had no authority to build a railroad into the county of Wilkes.

58 VIII. That as to the allegations of article eight of the complaint, the defendant admits that the act of 1879 was passed; and he admits that the ayes and nays on the second reading in the house of representatives do not appear as having been entered on the Journal of the House, according to the published volume of the Journal, but this defendant has never seen the original Journal, and he demands proof of said allegation.

IX. That as to the allegations of paragraph nine of the complaint, the defendant admits that an election was held, but the defendant denies that said election was held without authority, except that said vote, by an oversight, was taken upon a contract with the Richmond and Danville Railroad Company instead of the Northwestern North Carolina Railroad Company; and said election was for that reason abandoned, and a new election ordered.

X. That as to the allegations of paragraph ten of the complaint, the defendant admits that the results of the election were abandoned for the reasons set forth in paragraph nine of this answer.

XI. That as to the allegations of paragraph eleven of the complaint, the defendant admits that the election was held, and that a majority of the qualified voters of the county cast their ballots in favor of the subscription of one hundred thousand dollars to the said Northwestern North Carolina Railroad Company, but the defendant cannot say whether Exhibit "B" is a full transcript of the proceedings or not. That the other allegations in said paragraph are untrue, but the defendant avers that the election was legally held; that the board of commissioners were fully authorized, as he is advised, to order said election, and to make the subscription to the road, and to issue the bonds, under the original charter of the road, passed by the convention of North Carolina in March, 1868; and by virtue of authority conferred by sections 1896 and 2000, inclusive, of the Code of North Carolina.

XII. That as to allegations in paragraph twelve of the complaint, it is true that the board of commissioners issued the one hundred thousand dollars of bonds, and have levied a tax annually, to pay the interest on said bonds.

XIII. That it is true that the defendant has some funds on hand, as treasurer, to be applied on coupons that fall due in April and October, 1897, and money is in his hands to be applied in payment of coupons yet to fall due.

59 XIV. That it is true that said Call has been in the habit of paying said coupons, without any special order of said plaintiff board, but these payments were made by the consent and direction of the plaintiff board, and it was well understood between the said board and this defendant that these coupons should be paid by this defendant whenever he had the funds in hand.

That the plaintiff board levied a special tax to pay certain coupons for 1893 and 1894, which long remained unpaid, and certain bondholders, through their agent or agents had many times presented their coupons for payment, and this defendant did agree with said agent or agents to notify them when he should be in funds to pay the same; and this defendant did so notify said agent or agents, as soon as he came into possession of sufficient funds, to pay off these coupons, amounting to two thousand one hundred dollars, and this defendant did so pay them off. That this defendant has made no payments of coupons since this restraining order was served on him.

And for further defence, the defendant says:

1. That the Northwestern North Carolina Railroad Company was

chartered by an ordinance of the constitutional convention of North Carolina; that said ordinance was ratified the 9th day of March, 1868, and was published as chapter 17 of the ordinances of said convention, and a copy of said ordinance is hereto attached and marked Exhibit "A." That section two of said ordinance reads as follows: "Be it further ordained, that the capital stock of said company may be created by subscriptions on the part of individuals, corporations, and counties, in shares of one hundred dollars each." That section twelve of said ordinance reads as follows: "Be it further ordained, that the stockholders of said company may pay the stock subscribed to them, either in money, labor or material for constructing said road, as the board of directors may determine, and that all counties and towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations, and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic (Atlantic and North Carolina) Railroad Company for the government of such towns and counties as now allowed to subscribe to the capital stock of said company." That section thirteen of said ordinance reads as follows: "Be it further ordained, that the company shall have power to construct branches of said railroad, one of which shall run from said towns of Winston and Salem by way of Mt. Airy, in Surry county, to the line of the State of Virginia." That the provisions setting
60 forth the manner in which the towns and counties shall subscribe to the stock of the Atlantic and North Carolina Railroad Company are contained in sections 33 to 37, inclusive, of chapter 136 of the Laws of the General Assembly, session of 1852, a copy of which sections is hereto attached, and marked Exhibit "B."

II. That by virtue of said ordinance, the Northwestern North Carolina Railroad Company was organized on April 17, 1868. That in April 1868, the county of Forsyth, by virtue of the provisions of said ordinance, voted a subscription of one hundred thousand dollars to said railroad company, and said county issued bonds in payment of said subscriptions, the validity of which bonds has been upheld by the supreme court of North Carolina in the cases of Hill *vs.* Commissioners of Forsyth County, 67th N. C., page 367, and of Belo *vs.* Commissioners of Forsyth County, 76 N. C., 489.

III. That the work of grading the road-bed of said railroad began under the supervision of Edward Belo, now dead, the president of said railroad company, in the month of October, 1868, and continued all through the winter of 1868 and 1869; and by April 10th, 1869, considerable grading had been done on said railroad, seventy-five to one hundred and fifty hands having been employed during the winter on said work; and this defendant is advised that the Northwestern North Carolina railroad was an unfinished road on said 10th day of April, 1869 (1869).

IV. That the county of Forsyth had stock in said railroad company to the extent of seventy-five thousand dollars, and many citizens of the county of Forsyth, Guilford and other counties in the State, held stock in said company, from or soon after the organization of the company in 1868 to the year 1895.

V. That sections 1996 to 2000, inclusive, of the code were first enacted on the 10th day of April, 1869, and were intended, as set forth in the title to the act, "to authorize the several counties of the State to take stock in railroad companies," the act being published as chapter 171 of the Laws of 1868 and 1869. That this act was brought forward in Battle's Revisal as sections 66 to 70, inclusive, of chapter 99, and was also brought forward in the Code of North Carolina, ratified as one act, on March 2d, 1883.

VI. That this defendant is advised that the bonds of one hundred thousand dollars, issued by the board of commissioners
61 of Wilkes county, as aforesaid, were legally issued and were authorized by the provisions of the original charter, granted by the convention on March 9th, 1868, before the ratification of the present constitution, and that the power being given by said ordinance of said convention, the method of making said subscription is pointed out in sections 1996 to 2000, inclusive, of the code, the board of commissioners of said county of Wilkes being the successors in office of the board of justices and of the county court, existing before the adoption of the constitution in 1868.

That the election held on November 6th, 1888, was held in accordance with the provisions of the sections 1996 — 2000, inclusive, of the Code of North Carolina. That the defendant is informed that none of the bonds of the county of Wilkes, issued in aid of the completion of said Northwestern North Carolina railroad, are now held by said railroad company, but all of them are held by *bona fide* holders for value; and this defendant is advised that any irregularities in the method of holding said election, if any such did exist, would not in any way affect the validity of said bonds in the hands of *bona fide* purchasers for value.

VII. That the defendant is further advised that said board of commissioners was authorized to issue said bonds by virtue of the provisions of sections 1996 to 2000, inclusive, of the Code of North Carolina, which sections were first enacted on April 10, 1869. That the Northwestern North Carolina railroad was an unfinished or incomplete road on April 10, 1869, was such an unfinished and incomplete road on January 1, 1874, when the provisions in Battle's Revisal took effect; and was such an unfinished and incomplete road on November 1, 1883, the date on which the provisions of the Code of North Carolina took effect.

VIII. That the construction of the Northwestern North Carolina railroad from Greensboro, N. C., to Winston and Salem, N. C., was finished about the year 1872, and has since been operated as a railroad line, and freight and passenger trains have been run over the line of the same between Greensboro and Winston and Salem, a distance of some twenty-nine miles. That in 1887 the work of constructing the road and of grading the road-bed between Winston and Wilkesboro, in Wilkes county, was begun, and the said work of grading the said road-bed was continued until the work was completed, in the year 1890. That on the 6th day of November, 1888, the said railroad between the towns of Winston and Wilkes-

boro was an unfinished railroad, the work of constructing the
62 said railroad between said towns having not been finished, but the same being in an unfinished condition, many miles of the line between Winston and Wilkesboro being then unfinished.

IX. That the General Assembly of North Carolina, at its session in the year 1881, passed an act, which is published as chapter — of said laws, which authorizes the said Northwestern North Carolina Railroad Company to extend its road and to build branches; and said act provided for subscriptions by counties, cities and towns and townships, a copy of which act is hereto attached and marked Exhibit "C."

X. That the General Assembly of North Carolina, at its special session in 1868, passed an act ratifying the charter of the said railroad, published as act — of said acts, a copy of which is hereto attached and marked Exhibit "D," which is specially pleaded by this defendant.

Wherefore, the defendant prays that the restraining order heretofore granted be dissolved; that this action be dismissed, and the defendant recover the costs, and for such other and further relief as he may be entitled to.

(Signed) CLARENCE CALL,
Sheriff and Treasurer.

Clarence Call, being duly sworn, says: That the contents of this answer are true of his own knowledge, except as to matters stated on information and belief, and these he believes to be true.

(Signed) CLARENCE CALL.

Sworn to and subscribed before me, this January 28th 1898.

(Signed) H. R. STARBUCK,
Judge Superior Court.

EXHIBIT "A."

CHAPTER XVII.

An ordinance to incorporate the North Carolina Railroad Company.

SECTION 1. Be it ordained by the people of North Carolina in convention assembled, and it is hereby ordained by authority of the same, That for the purpose of constructing a railroad of one or more tracks, from some point on the North Carolina railroad, between the town of Greensboro, in Guilford county, and the town of
63 Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county, to some point in the northwestern boundary line of the State, to be hereafter determined, a company is hereby incorporated under the name and style of the Northwestern North Carolina Railroad Company, with a capital stock of two millions of dollars, which shall have a corporate existence as a body politic for the space of ninety-nine years, and by that name may sue and be sued, plead and be impleaded, in any court of law and equity in the State of North Carolina; and may

have and use a common seal, and shall be capable in law and equity of purchasing, holding, leasing and conveying estates, real and personal, and mixed, and acquiring the same by gift or devise, so far as may be necessary for the objects herein contemplated, and no further; and said company may enjoy all other rights and immunities which other corporate bodies may lawfully exercise, and may make all necessary by-laws and regulations for its government not inconsistent with the constitution and laws of the State of North Carolina and of the United States.

SEC. 2. Be it further ordained, That the capital stock of said company may be created by subscriptions on the part of individuals, corporations and counties, in shares of one hundred dollars.

SEC. 3. Be it further ordained, That books of subscription to the capital stock of said company shall be opened by the following commissioners, to wit: I. G. Lash, J. A. Vogler, H. W. Fries, in the town of Salem; and Thomas J. Wilson, Joseph Masten, R. A. Wilson, in the town of Winston, and by such other persons, and in such other places as the aforesaid commissioners may direct: and that ten days' notice of the opening of said books shall be given in one or more newspapers of this State; and, furthermore, that the said commissioners, or any four of them, may, at any time after said books have been kept open for the space of thirty days, and the sum of thirty thousand dollars has been subscribed to the capital stock of said company, and five per cent. paid thereon, have power to call together the subscribers to said stock for the purpose of completing the organization of said company; and the said subscribers shall be, and are hereby declared incorporated into a company by the name and style of the Northwestern North Carolina Railroad Company; and the said company may, from time to time, receive other subscriptions to its capital stock as it may deem proper.

64 SEC. 4. Be it further ordained That the company may hold annual meetings of its stockholders, and oftener if necessary, and at its organization and the annual meetings subsequent thereto, ten directors shall be elected to hold office for one year, or until their successors shall be elected; and any of said meetings shall have power to make or alter the by-laws of the company: Provided, that in all such meetings of the stockholders a majority of all the stock subscribed shall be represented in person or by proxy, which proxy shall be verified in the manner prescribed by the by-laws of the company; and each share thus represented shall be entitled to one vote on all questions; and, that it shall be the duty of the directors of the company to elect one of their own number as president of said company, and to fill all vacancies in their board.

SEC. 5. Be it further ordained That, after the organization of said company, and election of the president, and other necessary officers, the officers so elected shall proceed, under the advice of the directors, to locate the eastern terminus of the Northwestern North Carolina railroad, and shall proceed to construct said road, with one or more tracks, as speedily as practicable, in sections of five miles each, to the towns of Winston and Salem, in Forsyth county, which portion of said railroad, when completed, shall constitute its

First division: Provi-ed, that if the distance from the nearest section to the towns of Salem and Winston be less than five miles, the same shall be considered a section.

SEC. 6. Be it further ordained That said company shall have the same power to call for and enforce the payment of stock subscribed as was heretofore granted to the North Carolina Railroad Company by their charter of incorporation; and shall have power to condemn land for the use of the company, when a contract of purchase cannot be made with the owner thereof, to the same extent, and in the same manner, and under the same rules, regulations and restrictions, as the said North Carolina Railroad Company were authorized to do by their act of incorporation.

SEC. 7. Be it further ordained That, all contracts made and entered into by the president or superintendent of the company, whether with or without seal, shall be binding upon the company; and the president shall, under the instruction of the board of directors, issue certificates of stock to the stockholders, which shall be transferable in the manner prescribed by the by-laws of the company.

SEC. 8. Be it further ordained That whenever the president and chief engineer of said company shall certify to the governor
65 of the State that the grading of any of the sections of said road, as mentioned in section 5 of this ordinance, is completed and ready for the superstructure, he shall direct the public treasurer of the State to loan in behalf of the State to the said company the sum of fifty thousand dollars in coupon bonds; and in like manner the governor will direct similar loans to be made to the company, upon the completion of the grading of each and every section, until the First division is graded entire; and said company shall set aside the receipts of the road over and above its annual expenses, as a sinking fund to pay the said debts and interest, the whole amount of said debt and interest to be paid before the said company shall order any dividends on the stock of the company; and that said sinking fund so produced shall be semi-annually paid into the public treasury.

SEC. 9. Be it further ordained That no part of said loan or bonds shall be delivered to said company until the president and directors thereof shall execute and deliver to the governor of the State a mortgage on the entire road and its property, conditioned to save the State harmless against the loss of both principal and interest of said loan.

SEC. 10. Be it further ordained That the coupon bonds loaned, as aforesaid, shall be signed by the governor, countersigned by the treasurer and sealed with "the great seal of the State," bearing six per cent. interest, the principal payable at the end of thirty years from the date thereof, and the coupons for the interest payable semi-annually in such form as the public treasurer may direct.

SEC. 11. Be it further ordained, That the company may have the exclusive right of transporting persons and freight upon said road at such rates of charges as the board of directors may fix, and may

have power to farm or lease the same to any person or persons or corporation.

SEC. 12. Be it further ordained, That the stockholders of said company may pay the stock subscribed by them either in money, labor or material for constructing said road, as the board of directors may determine, and that all counties or towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company, for the government of such towns and counties as are now allowed to subscribers to the capital stock of said company.

66 SEC. 13. Be it further ordained, That the company shall have power to construct branches of said road, one of which shall run from said towns of Winston and Salem by way of Mount Airy, in Surry county, to the line of the State of Virginia.

SEC. 14. Be it further ordained, that this ordinance shall be in force from and after its passage.

Ratified this 9th day of March, A. D. 1868.

CALVIN J. COWLES, *President.*

T. A. BYRNES, *Secretary.*

EXHIBIT "B."

Chapter 136 of the Laws of North Carolina, session 1852.

SEC. 33. Be it further enacted That it shall be lawful for any incorporated town or county near or through which said railroad may pass to subscribe for such an amount of stock in said company as they shall be authorized to do by the inhabitants of said town or the citizens of said county, in manner and form as hereinafter provided.

SEC. 34. Be it further enacted That the corporate authorities of such town, of the justices of the peace of such county, a majority of the justices of the county concurring, *to* make an order requiring the constable of such town and the sheriff of such county, at such time and on such notice as they shall direct, to open a poll and take the sense of the voters of such town qualified to vote for town officers, and of the voters of such county qualified to vote for members of the House of Commons of the General Assembly, whether the officers of said town and the justices of the peace of said county shall subscribe to the stock of such company for such sum as the order shall propose, and the constable shall make return of the number against it, and the sheriff shall, in like manner, make return as to the vote in his county to the first court thereafter, to be held for such county and it shall be the duty of the sheriff to notify each justice of said county to attend at the courthouse to which he may make his returns of said poll.

SEC. 35. Be it further enacted That if upon the return of such constable and of such sheriff it shall appear that a majority of the qualified voters of such town, and by the return of

67 the sheriff that a majority of the qualified voters of such county voting upon the question are in favor of the sub-

scription, the corporate authorities of such town and the justices of such county shall appoint an agent to make the subscription in behalf of such town and county, to be paid for in the bonds of such town and county, and on such time as shall be agreed on by said town officers and the justices of such county.

SEC. 36. Be it further enacted That for the purpose of paying the quotas on said stock as may be called for or the installments of such subscriptions as may fall due, the town authorities and the justices of the county shall have power to appoint an agent or agents to negotiate a loan or loans for and in the name of such town and county; and it shall be the duty of the authorities of such town and the justices of such county to levy such taxes annually on the persons, lands and other personal property within such town and county as may be sufficient to pay the amount of such loan or loans and the interest thereon, and as said town authorities and the justices of such county shall deem necessary and proper, and to make such order or orders as shall be deemed necessary for the due collection and payment of the same; and the stock subscribed on behalf of such town and county shall stand pledged for the payment of the loan thus authorized to be contracted.

SEC. 37. Be it further enacted, That the right to the stock in the company hereby authorized to be subscribed, shall vest in the town and county making such subscriptions; and the corporate authorities of said town and the justices of such county shall have power from time to time to appoint a proxy to represent the stock in the meeting of the stockholders of the company, and also an agent to collect the dividends of such stock, and when collected, to apply the same to payment of the bonds and interest negotiated as aforesaid.

EXHIBIT "C."

An act to authorize the Northwestern North Carolina Railroad Company to extend its road and to build branches thereof.

The General Assembly of North Carolina do enact:

SECTION 1. That it shall be lawful for the Northwestern North Carolina Railroad Company to extend and construct its line of road, or a branch thereof, to commence at or near Winston, in the
68 county of Forsyth, through the counties of Forsyth, Davidson, Yadkin, Davie, Rowan, and Iredell, or any or either of them, to Statesville, or some other point on the Western North Carolina railroad, and may build and operate additional branches thereto, or from its present main line to any important mines or manufactories in any of said counties, or counties, adjacent to them; provided, that nothing contained in this act shall operate to be construed so as to prevent or interfere with the construction of the North Carolina extension of the Virginia Midland railroad from Danville, Virginia via Winston, Forsyth county, and Mocksville, Davie county, to some point on the Atlantic, Tennessee and Ohio railroad in Iredell county; but said company is hereby authorized to build said road under the organization and consolidation hereto-

fore made by the stockholders and directors of the consolidated line composing the North Carolina extension.

SEC. 2. That to provide the means in whole or in part for this purpose, the said company may receive subscriptions in money, labor, property, or otherwise, as the said company may agree, and may mortgage or otherwise pledge its property and franchises and the work constructed, or to be constructed, with the franchises and rights connected therewith.

SEC. 3. That any corporation, county, city, town, or township interested therein, may subscribe to stock for said purpose, or otherwise contribute to such work in such manner and in such amount as shall be determined by the proper authorities of such corporation, county, city, town, or township, and agreed on with the said Northwestern North Carolina Railroad Company.

SEC. 4. This act shall be in force from and after its ratification.

In the General Assembly, read three times, and ratified this the 2d day of March, A. D., 1881.

EXHIBIT "D."

An act ratifying and confirming the charter of the Northwestern North Carolina Railroad Company.

SECTION 1. The General Assembly of North Carolina do enact, that an ordinance, entitled "An ordinance to incorporate the Northwestern North Carolina Railroad Company," ratified the 9th day of March, A. D., 1868, be, and the same is hereby re-enacted, ratified and confirmed, and all acts and things heretofore done under the provisions of the said ordinance are hereby ratified and confirmed.

69 SEC. 2. That all the rights, powers and authorities conferred or purporting to be conferred by said ordinance, incorporating the Northwestern North Carolina Railroad Company, on the justices of the peace of Forsyth county, or of the county court of said county be, and the same are hereby, conferred on the commissioners of said county.

SEC. 3. That the commissioners of the county of Forsyth are hereby invested with full powers and authority to levy from time to time such tax as may be sufficient to pay the subscription made by said county to the capital stock of the Northwestern North Carolina Railroad Company, and any interest due thereon, or to liquidate any debt created by said county in borrowing money to pay such subscription stock.

Ratified the 11th day of August, A. D., 1868.

Replication.

Replying to the new matter set up in defendant's answer, the plaintiff says:

1. The plaintiffs admit that the Northwestern North Carolina Railroad Company was chartered by an ordinance of the constitu-

tional convention of 1868, which is published as chapter XVII of the ordinances, passed by said convention, and that the section- of the charter of the Atlantic and North Carolina Railroad Company, referred to in section 12 of said ordinance are those mentioned in the answer.

2. That plaintiffs have no knowledge, information or belief as to whether the company was organized as alleged or whether the county of Forsyth voted a subscription as alleged in section 2 of said new matter, and are advised that the validity of the bonds in controversy in this action is in no way dependent on the validity of any bonds that may have been issued in payment of said subscription, if any such were issued, as to which plaintiffs have no information on which to form knowledge or belief, and demand for strict proof.

3. Plaintiffs have no knowledge, information or belief as to whether any work was done on the present line of the Northwestern North Carolina railroad, lying between Greensboro and Winston, prior to the 10th of April, 1869, but deny that any grading had been done prior to said date, west of the original terminus of the division of Winston prior to said date, and aver that the portion of the line of said railroad lying between Winston and Wilkesboro, in
70 Wilkes county, N. C., is a new branch of said railway company, constructed under the requirement of the act referred to in the pleading as ratified on the 20th day of February, 1879; and that said branch was not on the 10th day of April, 1869, or prior thereto, a part of an unfinished line.

4. That plaintiffs have no knowledge, information, or belief as to whether the counties of Forsyth, Guilford or other counties in the State held stock as alleged in fourth section of said new matter; and the plaintiffs aver that the citizens of the county of Wilkes had no pecuniary interest, nor any other interest except such as they had in common with all citizens of North Carolina in the Northwestern North Carolina Railroad Company on the 10th day of April, 1869, or at any time prior thereto, or subsequent thereto until after the 6th day of November, 1888. And that they had had no pecuniary interest in said company or its road up to the time this action was brought, except such as purported to have arisen out of an exchange of the bonds of Wilkes county for those shares of stock in said company.

5. That plaintiffs admit that sections 1996 to 2000, inclusive, of the code, are in terms the same as chapter 171 of the Laws of 1868–1869, but deny that the bringing forward of said act in the compilation known as Battle's Revisal, had any effect in contemplation of law, the said revisal never having been lawfully enacted as a statu-e; nor as to the time when said company was organized, and demand strict proof.

6. In reply to section 6, contained in the new matter of defendant's answer, plaintiffs deny all allegations contained in said section, except the allegation that the bonds are not held by said railroad company, but by *bona fide* holders for value, as to which plaintiffs have no knowledge or sufficient information to form a belief, and therefore deny, except a legal proposition therein stated, and predi-

cated upon said last-named allegation of fact, and plaintiffs are advised that they are not required to swear to any proposition of law.

7. Replying to the seventh section of the new matter contained in defendant's answer, plaintiffs deny that the board of commissioners of Wilkes county had at the time of issuing the one hundred thousand dollars of bonds in controversy, any authority in law to issue the same or deliver them as a binding contract on the county of Wilkes. Plaintiffs deny that the Northwestern North Carolina railroad, located between Winston and Wilkesboro, was an unfinished or incomplete road on the 6th day of November, 1888, or at
71 any time prior thereto, and plaintiffs are advised that no section of the compilation known as Battle's Revisal ever had the force and effect of a statute.

8. The plaintiffs have no knowledge or information or belief as to the time when the portion of said railroad, located between Greensboro and Winston, was completed or begun to be operated. Plaintiffs have no knowledge or information sufficient to form a belief as to the allegation *that* the work of grading and constructing the roadbed from Winston to Wilkesboro in 1887, but admits that some grading had been done between Winston and Wilkesboro before the end of the year 1887. But denies the conclusion of law that the portion of said railroad lying between Winston and Wilkesboro was an unfinished and incomplete road on November 6th, 1888.

9. It is not true that section 3, chapter 162 of the Laws of 1881, purports to enact, "That any corporation, county, city, town or township interested therein, may subscribe to stock for said purpose (of extending said line of the railroad) or otherwise contribute to such work in such manner as shall be determined by the proper authorities of such corporation, county, city or town or township, and agreed on with the said Northwestern North Carolina Railroad Company. But the said act failed to pass on its third reading in the house of representatives, as appears from a certified copy of the journal of said house, which will be offered in evidence.

Further replying to the new matter in section 14 of the defendant's answer, the plaintiffs say that they are informed and believe that the defendant made payment of interest and took up coupons on the bonds in controversy after the service of summons on him in this action, and plaintiffs aver, according to their information and belief, the defendant, when said payment was made, had information that it was the purpose of the plaintiffs to apply to the courts for an order restraining him from making further payments of the interest on said bonds.

A. C. AVERY,
FINLEY & GREEN,
T. J. DULA,
Attorneys for Plaintiff.

C. C. Wright, one of the plaintiffs above named, maketh oath that the facts set forth in the foregoing reply, as of his own knowledge, are true, and those stated on information and belief, he believes to be true.

C. C. WRIGHT.

72 Sworn to and subscribed before me, this the 29th day of January, 1898.

H. R. STARBUCK,
Judge Superior Court.

Transcript of Journals—Senate and House.

HOUSE OF REPRESENTATIVES,
TUESDAY, *January 14th*, 1879.

By Mr. York, a bill to amend the charter of the Northwestern North Carolina Railroad Company for the construction of a Second division from Winston and Salem, Forsyth county, up the Yadkin River valley by Wilkesboro to Patterson, Caldwell county.

Referred to the committee on railroads, post-roads, etc.

HOUSE OF REPRESENTATIVES,
SATURDAY, *January 18th*, 1879.

Mr. Vaughan, from the committee on railroads, post-roads, etc., reports on H. B. 103, a bill to amend the charter of the Northwestern North Carolina railroad, for the construction of a Second division from the towns of Salem and Winston, Forsyth county, up the valley of the Yadkin river, by Wilkesboro to Patterson, Caldwell county, recommending its passage, with the adoption of an accompanying amendment.

HOUSE OF REPRESENTATIVES,
MONDAY, *January 20th*, 1879.

On motion of Mr. York,

H. B. 103, a bill to amend the charter of the Northwestern North Carolina railroad, W. C. R. R., for the construction of a Second division from Winston, Forsyth county, up the Yadkin valley, by Wilkesboro to Patterson, in Caldwell county, is taken up for consideration.

The question is on the amendment suggested by the committee, and it is adopted; and as amended, the bill passes its second reading; and then, on motion of Mr. York, is referred to the committee on internal improvements, with order to be printed, and it is ordered by the house.

HOUSE OF REPRESENTATIVES,
THURSDAY, *January 30th*, 1879.

Mr. York, on the part of the committee of internal improvements, submits the following reports on ——; and,

73 H. B. 103, a bill to amend the charter of the Northwestern North Carolina railroad, etc., recommending its passage with amendments proposed.

HOUSE OF REPRESENTATIVES,
SATURDAY, *February* 1, 1879.

H. B. 103, an act to amend the charter of the Northwestern North Carolina railroad, etc., is taken up on its third reading.

Mr. York submits a new section to be added to the bill by way of amendment, which is accepted.

Mr. Richardson submits the following amendments, which is accepted.

"Provided, that nothing in this charter shall be construed to exempt said road from taxation."

Mr. Carter, of Buncombe, submits an amendment, which, after discussion, is withdrawn.

The question is then put on the amendments offered by the committee, and they are accepted; and the question recurs on the passage of the bill.

Mr. Powers sends forward the following amendment:

Amend by inserting in the proper place, "Provided, however, that any county, township, or other corporate authorities who shall issue any bonds or assume any obligations in behalf of this road shall be required to commence as soon as said obligations are assumed, to provide a sinking fund that shall be sufficient to liquidate said bonds or obligations at maturity."

Mr. Christmas sends forward the following amendment:

"Strike out in line 6 the words 'a person' and insert 'two persons in the eastern part of the State and one in the western part;' and insert in line 17 between the words 'toll' and 'who are not in any respect interested in said work.'"

The question is put on the amendment, and it is rejected.

Mr. Turner sends the following amendment:

Strike out "convict and convict labor wherever it occurs in the bill."

The question is put on this amendment and it is rejected; and the question recurs on the passage of the bill; and it passes by the following vote, and is ordered to be engrossed and transmitted to the Senate.

Ayes—Messrs. Amis, Anderson, Angier, Ardrey, Armstrong, Bateman, Burhod, Bingham, Bizzell, Blocker, Bonner, Bost, Brown of Yadkin, Brison, Buchan, Cale, Carter of Buncombe, Carter
74 of Yancey, Carrol, Carson, Clark, Colwell, Council, Covington, Davis of Haywood, Deans, Dickson, Dunn, Ellison, English, Etheridge, Ferrell, Foard, Foster, Fulcher, Goldston, Grant, Harrill, Harrison, Hewett, Hines, Holt, Jones, Johnson of Davie, Lamb, Leatherwood, Lockhart, Lowrie, Lutterlow, Meares, Miller, McLean, Normant, Oliver, Orchard, Packston, Pettipher, Powers, Rawley, Reed of Macon, Richardson of Columbus, Robertson, Smith, Taylor, Turner, Venable, Wheeler, Wimberley, York, Young—total ayes, 72.

Nays—Carter of Warren, Christmas, Henderson, Horton, Osborne, Wynne—nays, 6.

HOUSE OF REPRESENTATIVES,
THURSDAY, *February 20th*, 1879.

The committee on enrolled bills reports as correctly enrolled:

An act to amend the charter of the Northwestern North Carolina railroad, and for the construction of a Second division from the towns of Winston and Salem, Forsyth county, up *to* the Yadkin valley to and by Wilkesboro, Patterson's factory, Caldwell county.

SENATE CHAMBER, *February 4th*, 1879.

A message was received from the House, ——, transmitting for concurrence:

H. B. No. 103, S. B. No. 378, bill to amend the charter of the Northwestern North Carolina railroad for the construction of a division from the towns of Salem and Winston, up the Yadkin valley by Wilkesboro, to Patterson's factory, in Caldwell county.

Referred to the committee on internal improvements.

SENATE CHAMBER, *February 11th*, 1879.

From the committee on internal improvements:

By Mr. Brower, H. B. No. 103, S. B. No. 378, bill to amend the charter of the Northwestern North Carolina railroad, for the construction of a Second division from the towns of Winston and Salem, Forsyth county, up the Yadkin valley, by Wilkesboro, to Patterson's factory, Caldwell county, recommending it do pass.

75 *Calendar.*

On motion of Mr. Nicholson, H. B. No. 103, S. B. 378, bill to amend the charter of the Northwestern North Carolina railroad for the construction of a Second division from the towns of Winston and Salem, Forsyth county, up the Yadkin valley, by Wilkesboro, to Patterson's factory, in Caldwell county, was taken up on its second reading as passed—ayes 33, noes 5, as follows:

Those voting in the affirmative were:

Messrs. Alston, Black, Bledsoe, Brower, Bryan of Duplin, Bryan of Pender, Bull, Caldwell, Dancey, Davidson, Dortch, Eppes, Graham of Lincoln, Graham of Montgomery, Harriss, Henderson, Holleman, Hoyle, Leach, Lyon, Matheson, Merritt, Mitchell, Moye, Nicholson, Ormand, Redwine, Ross, Scales, Stuart, Taylor, Wardwell, Ward—33.

Those voting in the negative were:

Messrs. Alexander, Austin, King, Mebane, Williamson—5.

SENATE CHAMBER, *February 12th*, 1879.

H. B. No. 103, S. B. No. 378, bill to amend the charter of the Northwestern North Carolina railroad for the construction of a Second division for the towns of Winston and Salem, in Forsyth county, up the Yadkin valley by Wilkesboro to Patterson's factory, in Caldwell county, passed its third reading—ayes 35, noes 1, as follows:

Those voting in the affirmative were:

Messrs. Alston, Bledsoe, Brower, Bryan of Duplin, Bryan of Pender, Bull, Bynum, Caldwell, Dancey, Dortch, Eaves, Eppes, Erwin, Everett, Graham of Lincoln, Harris, Henderson, Holleman, Hoyle, King, Leach, Lyon, Matherson, Mitchell, Nicholson, Ormand, Redwine, Respass, Rose, Scales, Stuart, Taylor, Waddell, Waldo, Ward—35.

Mr. Williamson voted in the negative.

SENATE CHAMBER, *February 20th*, 1879.

The committee on enrolled bills reported as correctly enrolled:

H. B. 103, S. B. 378, an act to amend the charter of the Northwestern North Carolina railroad, and for the construction of a Second division from the towns of Salem and Winston, Forsyth county, up the Yadkin valley, by Wilkesboro, to Patterson's factory, Caldwell county.

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SENATE CHAMBER, *January 21st*, 1881.

Bills and resolutions were introduced, read the first time, and disposed of as follows:

By Mr. Tucker, S. B. 224, bill to authorize the Northwestern North Carolina railroad to extend its railroad, and to build branches thereof.

Referred to the committee on internal improvements.

SENATE JOURNAL, *January 25th*, 1881.

From the committee on internal improvements:

By Mr. York, S. B. 224, bill to authorize the Northwestern North Carolina railroad to extend its road, and to build branches thereof, recommending it do pass.

Calendar.

SENATE JOURNAL, *January 29th*, 1881.

Bills and resolutions upon the calendar were taken up and disposed of as follows:

S. B. 224, bill to authorize the Northwestern North Carolina railroad to extend its road, and to build branches thereof.

On its second reading, Mr. Scott, of New Hanover, moves the bill be postponed until Thursday next. Lost.

Bill then passed its second reading—ayes 26, noes as follows:

Those voting in the affirmative were:

Messrs. Bernard, Burwell, Carr, Cunningham, Davidson, Dever, Dickey, Dortch, Eaves, Finger, Hanes, Hooper, Jenkins, Jones, King, Lockhart, Mebane, Newland, Oats, Pridgen, Richardson, Scott of New Hanover, Shears, Staples, Pucker, York—26.

The Calendar.

SENATE CHAMBER, *February 5th*, 1881.

S. B. 224, bill to authorize the Northwestern North Carolina railroad to extend its road and to build branches thereof, on its third reading.

Mr. Glenn moves to amend:

77 Add to the first section the following: "Provided that nothing contained in this act shall operate or be construed so as to prevent or interfere with the construction of the North Carolina extension of the Virginia Midland railroad from Danville, Virginia, via Winston, Forsyth county, and Mocksville,

Davie county, to some point on the Atlantic, Tennessee and Ohio railroad, in Iredell county: but said company is hereby authorized to build said railroad under the organization and consolidation heretofore made by the stockholders and directors of the consolidated line, comprising the North Carolina extension."

Mr. Tucker moves to amend the amendment:

"Strike out all after the words 'Iredell county' in line 12." Lost.

Mr. Glenn's amendment was adopted.

Bill then passed its third reading, ayes 34, as follows:

Messrs. Battle, Blue, Burwell, Carr, Davidson, Dickey, Dortch, Faison, Finger, Foil, Glenn, Gudger, Hampton, Hanes, Harper, Harris, Jenkins, Jones, Manning, Mebane, Merritt, Newsom, Oats, Parish, Richardson, Scott of New Hanover, Scott of Rockingham, Spears, Spruill, Stowe, Tucker, Whitaker, Williamson of Davie and Wynne—34.

SENATE CHAMBER, *February* 11*th*, 1881.

From the committee on engrossed bills:

By Mr. Spears, S. B. 224, bill to authorize the Northwestern North Carolina railroad to extend its road and build branches thereto.

SENATE CHAMBER, *March* 2, 1881.

From the committee on enrolled bills:

S. B. 224, H. B. 634, an act to authorize the Northwestern North Carolina railroad Company to extend its road and build branches thereof.

HOUSE OF REPRESENTATIVES,
FRIDAY, *February* 11*th*, 1881.

A message from the senate is announced, transmitting S. B. 224, a bill to authorize the Northwestern North Carolina railroad to extend its road and build branches thereof.

S. B. 224 is referred to the committee on corporations.

HOUSE OF REPRESENTATIVES,
SATURDAY, *February* 12*th*, 1881.

78 *Reports of Committees.*

—— favorably on ——; and S. B. 224, H. B. 634, a bill to authorize the Northwestern North Carolina railroad to extend its road and build branches thereto.

HOUSE OF REPRESENTATIVES,
MONDAY, *February* 21*st*, 1881.

S. B. 224, H. B. 634, a bill to authorize the Northwestern North Carolina railroad to extend its road and build branches thereto.

HOUSE OF REPRESENTATIVES,
TUESDAY, *February* 22, 1881.

The morning hour having expired, on motion of Mr. Carter, the vote by which S. B. 224, H. B. 634, a bill to authorize the North-

western North Carolina railroad to extend its road and build branches thereof, is reconsidered; and the bill is placed on the calendar.

HOUSE OF REPRESENTATIVES,
THURSDAY, *February 24th*, 1881.

The calendar is taken up, and

S. B. 224, H. B. 634, a bill to authorize the Northwestern North Carolina railroad to extend its road and build branches, is put on its third reading.

Mr. Carter offers the following amendment:

Amend by adding to section 3 the following words:

"Provided, that nothing in this act contained shall be construed to authorize or empower the Western North Carolina Railroad Company to lend its credit, or otherwise in any manner contribute to the work or any part thereof contemplated in this act."

The amendment is adopted; and as amended, the bill passes its third reading, and is ordered to be sent to the senate with engrossed amendments.

HOUSE OF REPRESENTATIVES,
WEDNESDAY, *March 2d*, 1881.

Mr. Green, of Orange, from the committee on enrolled bills, reports the following bill to have been correctly enrolled: An act to authorize the Northwestern North Carolina Railroad Company to extend its road and to build branches thereof.

79 *Certificate of Secretary of State.*

NORTH CAROLINA,
Department of State.

RALEIGH, N. C., *January 15th*, 1897.

I, Cyrus Thompson, secretary of state, do hereby certify that the foregoing and annexed nine sheets contain a full and accurate transcript of the Journals of the Senate and House of Representatives of the State of North Carolina, for the Session of the General Assembly in the Year 1879, of so much of said Journal as relates to H. B. 103, S. B. 378, a bill to be entitled An act to amend the charter of the Northwestern North Carolina railroad, and for the construction of a Second division from the towns of Winston and Salem, Forsyth county, up the Yadkin valley, by Wilkesboro, to Patterson's factory, Caldwell county, the title, as published, of chapter 43, Public Laws of the Session of 1879; and of so much of the Journals of Senate and House of Representatives of the State of North Carolina, for the Session of the General Assembly in the Year 1881, as relates to S. B. 224, H. B. 634, a bill to be entitled An act to authorize the Northwestern North Carolina Railroad Company to extend its road and to build branches thereof, the title, as published, of chapter 162 of Public Laws of the Session of 1881.

Done in office at Raleigh, this the 15th day of January, A. D., 1897.

[SEAL.]

CYRUS THOMPSON,
Secretary of State.

Affidavits of G. W. Hinshaw.

N. C., }
Wilkes Co. }

In Superior Court.

G. W. Hinshaw, being duly sworn, deposes and says: That he is now, and was, in the spring of 1868, a resident of the town of Winston, Forsyth county, N. C. That in the spring of 1868 the county of Forsyth voted a subscription of one hundred thousand dollars to the Northwestern North Carolina Railroad Company. That thereafter and before the 6th day of November, 1888, the county of Forsyth became the owner of seventy-five thousand dollars of stock in said Northwestern North Carolina Railroad Company; and prior to said day in November, 1888, citizens of the county of Forsyth and of other counties in the State of North Carolina became owners of stock in the said Northwestern North Carolina Railroad Com-
80 pany, and that said county of Forsyth and said citizens were owners of said stock on said 6th day of November, 1888, and remained owners of said stock until the year 1895. That he is acquainted with the issuing of the bonds of Wilkes county in aid of the completion of the Northwestern North Carolina railroad; that none of the bonds are now held or owned by the Northwestern North Carolina Railroad Company, but the same were sold for value by the said railroad company before the year 1893. That the construction of the Northwestern North Carolina railroad from Greensboro, N. C., to Winston and Salem, N. C., was finished about the year 1873, and the line has since been and is now operated as a railroad line, freight and passenger trains having been run over the line of the same between Greensboro, N. C., and Winston and Salem, N. C., a distance of some twenty-nine miles. That in the year 1887, the work of constructing the road and of grading the road-bed between Winston, in Forsyth county, and Wilkesboro, in Wilkes county, was begun; and the work of grading said road-bed was continued until the work was completed to or near Wilkesboro, in the year 1890. That on the 6th day of November, 1888, the said Northwestern North Carolina railroad, between the towns of Winston and Wilkesboro, was an unfinished and incomplete railroad, the work of constructing the said railroad between the said towns having not been finished on said day in November, but the same being in an unfinished condition on said day, many miles of the line between said towns of Winston and Wilkesboro being ungraded and unfinished.

(Signed) G. W. HINSHAW.

Sworn and subscribed before me, this the 27th day of January, 1898.

N. S. WILSON,
Clerk Superior Court,
By SAM F. VANCE, *D. C.*

G. W. Hinshaw being duly sworn, says: That he was acquainted with the vote of the people of Wilkes county, referred to as Exhibit

"A" in the suit and attached to the complaint of plaintiff. That the vote was taken, based upon a contract with the Richmond and Danville Railroad Company instead of upon a contract with the Northwestern North Carolina Railroad Company, and the same was abandoned for that reason, and another vote taken in November, 1888.

(Signed) G. W. HINSHAW.

81 Sworn to and subscribed before me this 28th day of January, 1898.

(Signed) H. R. STARBUCK,
Judge Superior Court.

Certificate of Capital Stock.

Northwestern North Carolina Railroad Company, No. 159. Three hundred and thirty shares. Capital stock, two million dollars. Shares one hundred dollars each.

Be it known that commissioners of Wilkes county are entitled to three hundred and thirty shares in the Northwestern North Carolina Railroad Company, transferable by the said commissioners, either personally or by attorney, only at the office and in the books of said company.

Witness, A. B. Andrews, president of the Northwestern North Carolina — Company at Raleigh, N. C., under the seal of the corporation, this 9th day of May, A. D. 1890.

A. B. ANDREWS, *President.*
W. BROOK, *Secretary.*

Northwestern North Carolina Railroad Company, No. 160. Six hundred and seventy shares. Capital stock, twelve million dollars. Shares, one hundred dollars each.

Be it known that commissioners of Wilkes county are entitled to six hundred and seventy shares in the Northwestern North Carolina Railroad Company, transferable by the said ——, either personal- or by attorney, only at the office and in the book of said company.

Witness, A. B. Andrews, president of the said Northwestern North Carolina Railroad Company, at Raleigh, N. C., under the seal of the corporation, this 25th day of July, A. D. 1890.

A. B. ANDREWS, *President.*
W. BROOK, *Secretary.*

Certificate of Register.

NORTH CAROLINA, }
Wilkes County. }

I, E. M. Blackburn, register of deeds for Wilkes county, do hereby certify that the foregoing is a true copy, as occurs on railroad claim book, as appears in my office.

E. M. BLACKBURN,
Register of Deeds.

February 14, 1898.

82 *Affidavit of W. H. Watkins.*

W. H. Watkins, being duly sworn, deposes and says.—That in November, 1868, he was living near Clemmonsville, Davidson county, N. C., about eleven miles southwest of the towns of Winston and Salem. That in November, 1868, he left home and went to work as a foreman of hands, who were engaged in grading the road-bed of the Northwestern North Carolina railroad, about six miles east of the town of Salem, on the Levi Crews place. That there was under him about thirty-five hands. That he continued to work there in the construction of said road-bed during the winter of 1868 and in the spring of 1869, and remained as such foreman of hands grading said road at different points along the line until the entire line of road between Winston and Greensboro was completed, two or three years afterwards. That during the winter of 1868 and the spring of 1869 there were several companies of hands grading the said road-bed at different points along the line; and by the first of April, 1869, considerable grading had been done on said road-bed. That this work was being done by railroad company, under the general supervision of Edward Belo, now deceased, who was president of said railroad company.

W. H. WATKINS.

Sworn to and subscribed before me, this 28th day of January, 1898.

N. S. WILSON,
Clerk Superior Court,
By SAM F. VANCE, *D. C.*

Clerk's fee, twenty-five cents. Paid.

Affidavit of Rufus Harmon.

Rufus Harmon, being duly sworn, deposes and says:—That he was, in the year 1868, and is now, a resident of the town of Kernersville, in Forsyth county, North Carolina, a town on the line of the Northwestern North Carolina Railroad Company. That about the middle of October, 1868, Edward Belo, the president of the Northwestern North Carolina Railroad Company, sent to Kernersville for this affiant, and asked him to go on to Jonathan Crews' place, in Forsyth county, N. C., about three miles east of Salem, to build stockades for the hands employed by said Belo to grade the road-bed of said railroad. That this affiant went immediately, or within
83 a few days, to the said Crews' place, and on his arrival found three companies of hands with wheelbarrows, grading the road-bed of said railroad. That he remained with these companies of hands, made up of about twenty-five men each, until some time in April, 1869, when he was transferred to work on the line of said railroad in Guilford county. There companies of hands, at first with wheelbarrows and afterwards with cars and mules, worked in grading said railroad from the middle of October, 1868,

to April, 1869, continuously, with the possible exception of a few wet or cold days. That in addition to the carpenter work done by him, he was appointed commissary of subsistence, and gave out the rations to the hands, and before leaving, in April, 1869, he was giving out rations to about one hundred and fifty railroad hands. Edward Belo, now dead, was president of the railroad company during these months, and had general charge of the building of the road. In April, 1869, he was appointed by the chief superintendent of hands, J. J. Cahill, assistant superintendent of the construction force, and was sent to Guilford county and took charge of supplying the hands who were working in the county of Guilford on said road. That in April, 1869, several companies of hands began to work on the grading of the road in Guilford county, the work of grading continuing in the county of Forsyth. After remaining for some time at work in Guilford county, he was transferred to the work of grading at Bath Branch, in the county of Forsyth, just east of the town of Salem, N. C.

R. HARMON.

Sworn to and subscribed before me, this 21st day of January, 1898.

J. M. GUYER, *J. P.*

Fees, twenty-five cents. Paid.

Affidavit of C. C. Wright.

C. C. Wright, being duly sworn, says, that he is and has been a citizen and resident of Wilkes county for thirty-five years; that he was cognizant of the proceedings had in the railroad election mentioned, on June 16, 1887, and of the subsequent election held on November 6, 1888; and that never before has he heard that the reason the Northwestern North Carolina railroad was not completed, in accordance with the proposition first submitted, was because it was voted to the Richmond and Danville Railroad
84 Company, and not voted to the Northwestern North Carolina Railroad Company, as alleged in the affidavit of G. W. Hinshaw. But that the reason publicly given to the people of Wilkes county was that the time was too short for the railroad company to build the road, and, therefore, an extension of time was asked.

C. C. WRIGHT.

Subscribed and sworn to before me, January 29, 1898.

H. R. STARBUCK, *Judge.*

Admission of Counsel.

I admit that the act of 1868, chapter 171, purporting to provide for submitting the question of subscription, was read three times on different days in each house of the General Assembly, and was passed in accordance with the requirements of the constitution, article 2, section 14.

I do not admit, either, that said act or any part of it was in force, when either vote was taken in Wilkes county, as set forth in the exhibit to the plaintiff's complaint, or that, if in force, it authorized either of said elections.

A. C. AVERY.

Winston, February 15, 1898.

Injunction.

This cause, coming on to be heard before Starbuck, judge, at chambers, in Winston, upon a motion by plaintiffs to enjoin defendant until the final hearing from paying any portion of the principal or interest of the bonds issued by the county of Wilkes and described in the complaint. Upon consideration of the pleadings, treated as affidavits upon this hearing, the exhibits and all the affidavits and evidence introduced, it is now adjudged that the defendant, Clarence Call, sheriff of Wilkes county, be, and he is hereby enjoined and restrained until the final hearing or this cause from paying any portion of the moneys belonging to the county of Wilkes, and in his hands upon the principal or interest of the said bonds.

This February 18th, 1898.

(Signed) HENRY R. STARBUCK,
Judge Superior Court, Ninth Judicial District.

(To this judgment defendant excepts. Fifteen days allowed defendant to serve statement of case on appeal, and ten days thereafter allowed plaintiffs to serve exceptions or counter statements. Appeal bond fixed at one hundred dollars.)

(Signed) H. R. STARBUCK, *Judge, etc.*

85 *Order to Make New Parties Defendant.*

On motion of Richard N. Hackett, counsel for J. M. Turner and J. M. Wellborn, and by consent of the plaintiff, the said J. M. Turner and J. M. Wellborn, as the owners of one of the bonds of the county of Wilkes, the validity of which is controverted in the above-entitled action, are allowed to make themselves parties defendant to said action, and to file an answer.

(Signed) ALBERT L. COBLE,
Judge Presiding.

Answer of J. M. Wellborn and J. M. Turner.

The defendants, J. M. Turner and J. M. Wellboro, in answer to complaint, say:

I. That since this action was brought they have become the owners of one of the bonds, the validity of which is controverted in the above-entitled action and which were issued by the county of Wilkes, the number and amount being set forth in the complaint; and that the bond, of which they have so become the owners is numbered 34, of

the series of one hundred, issued at the time mentioned in the complaint.

II. That they adopt the answer of their codefendant, Clarence Call, treasurer of Wilkes county, as their own, and ask that it be taken and considered as the answer of these defendants, to all intents and purposes as if these defendants had denied the allegations of the complaint which are controverted by said Call in detail, and in the very language used in the answer of said Call.

III. That these defendants are advised, informed and believe that the rights of themselves and of the other owners of the said one hundred bonds, issued by the county of Wilkes, as owners of such bonds, have not been adjudicated in this action.

IV. Wherefore, these defendants pray:

1. That the order made by his honor, H. R. Starbuck, judge, at chambers, in Winston, N. C., containing the restraining order theretofore granted in this case, until the hearing of the cause, be vacated.

2. That said bonds be declared valid.

86 3. For such other and further relief as to the court may seem just.

4. For costs of action.

(Signed) RICHARD N. HACKETT,
Attorney for Defendants, Turner and Wellborn.

J. M. Turner and J. M. Wellborn, being duly sworn, depose and say, each for himself, that the facts stated in the foregoing answer as of his own knowledge are true, and those stated on information and belief, he believes to be true.

(Signed) J. M. TURNER.
(Signed) J. M. WELLBORN.

Sworn to and subscribed before me, this 8th day of March, 1898.

(Signed) A. W. VANNOY,
Clerk Superior Court,
By H. T. SMOAK, *D. C.*

Order of Removal.

This cause coming on to be heard before his honor, Coble, judge, upon motion of Richard N. Hackett, counsel for the defendants, J. M. Turner and J. M. Wellborn, who had been made parties defendant, and had answered at the present term of the court, to vacate and set aside the judgment of his honor, H. R. Starbuck, judge, rendered at chambers, at Winston, and containing the restraining order theretofore made to the hearing of the cause; and it appearing that a holder of the bonds, the validity of which is controverted, is related by affinity to the presiding judge.

It is by consent of counsel for the plaintiffs and counsel for defendants, J. M. Turner and J. M. Wellborn, ordered that *that* the motion be removed, to be heard before H. R. Starbuck, judge riding the tenth judicial district, at chambers, at Marion, North Carolina, on Monday, March 14, 1898, at 8 o'clock p. m.

The counsel for the defendants, Turner and Wellborn, being engaged at a term of the superior court of Wilkes county, which is expected to last beyond the 14th of March, at the request of said counsel, the counsel for the plaintiff agrees that all of the testimony offered at the hearing at Winston, before Judge Starbuck, shall be considered as offered at the hearing at Marion, on the 14th instant, subject to any objections as to competency made at the former hearing; and that his honor, Judge Starbuck, at the time of said hearing at Marion, or as soon thereafter as may be convenient to him, may make up a statement of case on appeal, without notice to the counsel, it being understood that the party against whom judgment may be rendered will desire to appeal to the supreme court of North Carolina.

87

It is further understood between counsel that the agreement this day, signed with a view to hearing before Judge Coble of the motion submitted, shall be considered as binding on the hearing before Starbuck, judge, at Marion, on March 14th.

(Signed) ALBERT L. COBLE,
Judge Presiding.

It is agreed, that in addition to the pleadings and exhibits and affidavits offered at the former hearing, the original charter of the Northwestern North Carolina Railroad Company, passed by the constitutional convention of 1868, and all amendments thereto, including the amendatory acts of 1879 and 1881, shall be read in evidence; and that the amendments passed in 1879 and 1881, purporting to give to another authority to submit the question of subscription to the capital stock of the company, were not passed by the house of representatives in accordance with the requirements of the constitution, and the certified exhibits from the journal of said sessions need not be offered or sent up as a part of the testimony.

It is agreed that the only legislation that is relied upon to give such authority is the original charter, passed as an ordinance of the constitutional convention of 1868, and the general statute enacted in 1868, as chapter —, being in the same language as contained in the code, sections 1996 to 2000, both inclusive.

It is further agreed, that the plaintiff still objects to the testimony offered for the defendant, Call, on the former hearing, to show when the Northwestern North Carolina Railroad Company was organized or incorporated.

(Signed) A. C. AVERY,
Attorney for Plaintiffs.

(Signed) RICHARD N. HACKET,
Attorney for Defendants, J. M. Turner and J. M. Wellborn.

88 *Judgment.*

This cause, coming on to be heard, upon motion of Richard N. Hackett, attorney for J. M. Turner and J. M. Wellborn, the holders of one of the bonds issued by the county of Wilkes, the validity of which is now in controversy in this action, and it appearing that

said motion was made before Coble, judge, at the spring term, 1898, of the superior court of Wilkes county; and that the said judge, being related by affinity to some of the holders of the bonds in controversy, said motion was by consent of counsel removed, to be heard at chambers, at Marion, on the 14th of March, 1898; and by consent of counsel for plaintiffs and counsel for the said Turner and Wellborn, the hearing of said motion was continued, first to be heard at Winston, on March 18th, 1898, and subsequently to be heard at Morganton, on March 22d, 1898; and being heard at last-named time and place, before the undersigned, upon the testimony heretofore offered, as set forth in a written agreement of counsel:

It is now, on motion of A. C. Avery, Finley and Green and Thomas Dula, counsel for the plaintiff, and upon hearing and considering the documentary evidence, mentioned in said agreement of counsel, considered and adjudged, that the motion to vacate, made on behalf of the defendants, Turner and Wellborn, as holders of one of the bonds in controversy. The order heretofore made containing restraining order until the hearing of the cause, be refused upon the ground that the bonds in controversy were issued by the board of commissioners of Wilkes county, without lawful authority so to do, and are invalid and void.

From the judgment of the court, refusing to vacate the said order containing the injunction to the hearing, the defendants, Turner and Wellborn appealed. Notice of appeal was waived, and an appeal bond in the sum of one hundred dollars adjudged sufficient.

H. R. STARBUCK,
Judge Riding Tenth Judicial District.

Statement of Case on Appeal.

It having been agreed that the undersigned should make up the statement of case on appeal without summoning counsel, it is ordered that the portions of the record, and the evidence mentioned in the agreement of counsel, entered into at spring term, 1898, in the superior court of Wilkes county, together with the sum-
89 mons, pleadings, exhibits, orders heretofore made, and the foregoing judgment rendered at chambers at Morganton, on the 22d of March, 1898, shall constitute the statement of the case on appeal.

H. R. STARBUCK,
Judge Riding Tenth Judicial District.

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90 *Petition of J. M. Turner and J. M. Welborn for an Injunction and Appointment of a Receiver.*

NORTH CAROLINA, }
Wilkes County. }

In the Superior Court.

THE COMMISSIONERS OF WILKES COUNTY and C. C. WRIGHT }
vs.
CLARENCE CALL, Treasurer, and J. M. TURNER and J. M. WELBURN. }

The petition of the undersigned respectfully showeth to the court:

1st. That in the above-entitled action the controversy involved the validity of $100,000, in bonds issued by the county of Wilkes in aid of the Northwestern North Carolina Railroad Company, and in lieu of shares of its stock, and that the defendant-, J. M. Turner and J. M. Welborn, are the owners of one of the bonds so issued, of the denomination of $1,000, and have taken the said action by writ of error from a decision adverse to the claim of right by them under the Constitution of the United States, to be heard by the Supreme Court of the United States where the said action is now pending for consideration.

2nd. That as petitioners, J. M. Welburn and J. M. Turner are informed and believe, Clarence Call, whose term of office as sheriff and *ex officio* treasurer of Wilkes county expired on the first Monday

in December, 1898, but who continues as tax collector to collect tax for the current year, has in his hands about the sum of $7,100.00 already collected as a special tax levied to meet the interest on said bonds, which he will pay over and may at any time pay over to his successor, John Johnson, who was elected sheriff on the 8th day of November, 1898, and on his induction into said office on the 1st Monday in December, 1898, became *ex officio* treasurer of said county, and that the said Call has been collecting and is collecting from time to time, a special tax levied for the same purpose for the current year, which he will, as required by law, pay or ought to pay over to the said Johnson, treasurer, as the same comes into his hands.

3rd. That, as petitioners are advised, it has been held by the supreme court of North Carolina in the case of Board of Education *vs.* Commissioners, 113 N. C., pp. ——, that where the treasurer of a county, as agent of and under the orders of the board of commissioners of such county applies a fund raised by special tax for
91 a particular purpose in payment of some county indebtedness other than that to which it was specially levied and collected, neither the said commissioners individually, nor the said treasurer individually, nor his bondsmen are liable to account for said funds so disbursed; and that such special tax cannot lawfully be replaced when so disbursed by a second levy for the same purpose, and that, therefore, if upon the receipt of any such special tax funds by the said Johnson, as treasurer, it shall be paid out, as it is liable to be so paid, the defendants, Turner and Welburn and other holders of said bonds, who have been invited by them to join in the defense of the above-entitled action will suffer irreparable loss.

Wherefore your petitioners pray that a receiver be appointed to take charge of said special tax fund already collected or which may hereafter be collected and hold the same subject to the order of the court.

2nd. That the plaintiffs and their agents be enjoined and restrained from disbursing any of said funds for any purpose other than for which it was levied until the qualification of such receiver and until the first adjudication in the action.

R. N. HACKETT,
Att'y for Petitioners.

J. M. Welburn, one of the defendants above named, and one of the petitioners, maketh oath that the facts set forth in the foregoing petition are true, except such as are stated on information and belief, and those facts he believes to be true.

J. M. WELBORN.

Sworn to and subscribed before me, this 31st day of January, A. D. 1899.

Witness my hand and seal of office.

L. BUMGARNER, *C. S. C.*

92 *Order Issued by Superior Court Appointing Receiver and Enjoining the Treasurer and Other Officers of Wilkes County.*

NORTH CAROLINA, *Wilkes County.*

Superior Court, at Chambers, at Winston, N. C.

THE COMMISSIONERS OF WILKES COUNTY and C. C. WRIGHT
vs.
CLARENCE CALL, Treasurer, and J. M. TURNER and J. M. WELBORN.

It appearing to the court by affidavit filed on behalf of the defendants, Turner and Welborn, that the above-entitled action has been taken up by writ of error from the supreme court of North Carolina to the Supreme Court of the United States, and that pending the consideration — the case in the Supreme Court there is a fund collected as special tax to meet the interest on the bonds in controversy still in the hands of Clarence Call, treasurer, amounting to about $7,100, which fund is to be paid over by him to John Johnson who became sheriff and *ex officio* treasurer on his induction into office on the 1st Monday in December, and that it will become the duty of the said Johnson, pending said appeal, to collect special tax also levied to meet the interest on said bonds, and it further appearing that if the board of commissioners of Wilkes county inducted into office on the 1st Monday in December, 1898, should cause any of the special tax fund, levied and collected to meet the interests on said bonds, to be applied to the payment and discharge of any other indebtedness of Wilkes county, and that the holders of said bonds could neither recover the sum so disbursed, if such disbursement should be held wrongfully by the Supreme Court of the United States, from the said treasurer or his bondsmen, nor from the said commissioners, personally, and that another special tax could not be levied upon the property of the people of Wilkes county to again raise funds to meet said interest in place of that so expended, and that the said commissioners are threatening to pay out such funds so collected and being collected, and thereby subject the defendant bondholders to irreparable loss and injury.

It is now, therefore, ordered, on motion of Richard N. Hackett, Esq., counsel for the defendants, Turner and Welborn, and by consent of A. C. Avery, attorney for the plaintiff; that J. G.

93 Hackett be appointed receiver to receive and take charge of any fund now in the hands of the said Call, or the said Johnson, or that may be paid over by said Call as tax collector to said Johnson as treasurer, and of such fund hereafter collected as special tax to pay the interest on said bonds, and that upon the filing by the said J. G. Hackett of a bond in the sum of $20,000, conditioned to faithfully account for all such sums of money as may come into his hands as receiver, and to disburse the same only under the orders of the court, the said J. G. Hackett is empowered and directed to receive and take charge of all funds collected by special tax to

meet the interest on said bonds, which has been already collected, or which may be collected hereafter.

It is further ordered that pending the consideration of the action in the Supreme Court of the United States, and until the further order of the court, upon the filing by said defendants of a bond in the sum of $100.00, conditioned as prescribed by law, where restraining orders or injunctions are granted, notice shall issue to the plaintiff that they and their agents, the treasurer of said county, and other agents, are enjoined and restrained, pending the consideration of the action in the said Supreme Court until the further order of this court.

O. H. ALLEN,
Judge Riding 9th Judicial Dist.

As attorney for the plaintiffs in the above-entitled action, I waive notice of the motion of defendants' counsel, R. N. Hackett, and agree that the foregoing order shall be made by the court, the judge now riding the 9th judicial district, whenever and wherever application may be made to him to grant said order.

A. C. AVERY,
Attorney for Plaintiffs.

NORTH CAROLINA, }
Wilkes County. }

In the Superior Court, February, 1899.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY and C. C. Wright
vs.
C. CALL, Treasurer of Wilkes County, and J. M. WELBORN and J. M. Turner.

This is to certify that J. G. Hackett, who has been duly appointed receiver in the above-entitled cause, has this day filed before me the bond required by Judge O. H. Allen, now riding the 9th
94 judicial district, and the same is hereby approved by me, and C. Call, ex-sheriff & treasurer of Wilkes county, and J. H. Johnson, present sheriff and treasurer of Wilkes county, are hereby ordered to turn over to J. G. Hackett, receiver, all the moneys in their hands mentioned in the order of his honor Judge Allen, a copy of which is hereto attached.

L. BUMGARNER,
Clerk Superior Court.

Bond of Receiver.

NORTH CAROLINA, }
Wilkes County. }

In the Superior Court.

THE COMMISSIONERS OF WILKES COUNTY and C. C. WRIGHT }
vs. }
CLARENCE CALL, Treasurer, and J. M. TURNER & J. M. WELBORN. }

Know all men by these presents that we, the undersigned, J. G. Hackett, principal, and C. N. Hunt, A. M. Church, J. R. Combs, J. E. McEwen, T. B. Finley, R. N. Hackett, sureties, are held and firmly bound unto the County of Wilkes, and State of North Carolina, in the sum of $20,000, to be levied on our lands and tenements, goods and chattels, to the faithful performance of which obligations we bind ourselves, our heirs and personal representatives.

The conditions of the above obligation are as follows: That whereas, the above-bounden J. G. Hackett, has been duly appointed receiver by his honor, O. H. Allen, judge riding 9th judicial district, to receive and take charge of any funds now in the hands of Clarence Call, ex-treasurer and tax collector of Wilkes county, or in the hands of J. H. Johnson, sheriff and *ex officio* treasurer of Wilkes county, which may have been collected by said Call as a special tax to pay the interest on the bonds in controversy in the above-entitled action and turned over by said Call as tax collector, to said Johnson as treasurer, and of such funds as may be hereafter collected by the tax collector of Wilkes county, as special tax to pay the interest on said bonds:

Now therefore if the said J. G. Hackett shall faithfully account for all such sums of money as may come into his hands as re-
95 ceiver, above named, and disburse the same only under the orders of the court, then this obligation shall be null and void, otherwise to remain in full force and effect.

Feb'y 23rd, 1899.

J. G. HACKETT. [SEAL.]
C. N. HUNT. [SEAL.]
A. M. CHURCH. [SEAL.]
J. R. x COMBS. [SEAL.]
J. E. McEWEN. [SEAL.]
T. B. FINLEY. [SEAL.]
R. N. HACKETT. [SEAL.]

C. N. Hunt, being duly sworn, says that he is worth the sum of $2,000 over and above his debts, liabilities and homestead and personal property exemptions.

A. M. Church, being duly sworn, says that he is worth the sum of $5,000 over and above his debts, liabilities and homestead and personal property exemptions.

A. M. CHURCH. [SEAL.]

J. R. Combs, being duly sworn, says that he is worth the sum of $5,000 over and above his debts, liabilities and homestead and personal property exemptions.

his
J. R. x COMBS. [SEAL.]
mark.

Attest: L. N. HICKERSON.

J. E. McEwen, being duly sworn, says that he is worth the sum of $3,000 over and above his debts, liabilities and homestead and personal property exemptions.

J. E. McEWEN. [SEAL.]

T. B. Finley, being duly sworn, says that he is worth the sum of $5,000 over and above his debts, liabilities and homestead and personal property exemptions.

T. B. FINLEY. [SEAL.]

R. N. Hackett, being duly sworn, says that he is worth the sum of $8,000 over and above his debts, liabilities and homestead and personal property exemptions.

R. N. HACKETT. [SEAL.]

Personally appeared before me, L. Bumgarner, clerk superior court of Wilkes county, the above-named J. E. McEwen, T. B. Finley, and R. N. Hackett, who being duly sworn say that they signed the above bond and that they are worth the amounts qualified
96 too by them in the above justification which was subscribed and sworn to before me this the 23rd day of February, 1899.

L. BUMGARNER, *C. S. C.*

Personally appeared before me, L. N. Hickerson, may- of the town of North Wilkesboro, J. R. Combs, C. N. Hunt and A. M. Church, who being duly sworn, say that they signed the above bond, and that they are worth the amount sworn too by them in the above justification which was subscribed and sworn to before me this February, 23rd 1899.

L. N. HICKERSON,
Mayor of North Wilkesboro.

Certificate of Superior Court Clerk.

NORTH CAROLINA, }
Wilkes County. }

I, L. Bumgarner, clerk of the superior court of Wilkes county, do hereby certify that the foregoing is a true copy of the original papers on files in this office in the case of The Board of Commissioners of Wilkes County *vs.* Clarence Call *et al.*, including petition and order appointing receiver and bond of receiver, with the exception of those portions marked out in the printed record, which are only referred to in the original papers, and that the copy of transcript of Journals,

Senate and House, is an exact copy as certified to this office by the secretary of state.

Witness my hand and seal, this April 11th, 1899.

[SEAL.] L. RUMGARNER,
Clerk Sup'r Court.

Endorsed: Filed in this office, April 12th, 1899. Sam'l L. Trogdon, clerk.

Answer of Clarence Call.

UNITED STATES OF AMERICA,
Western District of North Carolina.

W. N. COLER ET AL.
vs.
THE BOARD OF COMMISSIONERS OF WILKES County, Clarence Call, ex-Sheriff, *et al.*
Answer of C. Call.

Clarence Call, *answer* the complaint in the above-entitled cause, says:

97 1. That paragraphs 1, 2, 3, 4, 6, 7, 9, 10, 11, 12, 13, 14, 15, 19, 20, 22, 23, 24 & 27 are true.

2. That paragraphs 5, 8, 21 & 25 — supposed to be true.

3. That paragraph 16 is not denied, except the charge of collusion between this affiant and the plaintiff in the injunction proceedings in the State courts, which is denied.

4. That this defendant can neither admit nor deny paragraph 16, but says, in reply thereto, that after the injunction proceedings had been heard by Judge Starbuck, that this defendant concluded he would not perfect his appeal—said decision being in favor of the county, and believing that said judgment would stand till reversed, thought it best for the county that he should not appeal, and shortly thereafter, to his surprise, the counsel for the county of Wilkes, in said suit, wanted him to appeal to the supreme court of North Carolina, and when he declined was offered to be indemnified against any cost he might incur by reason of said appeal, including his attorneys' fee for arguing said case in the supreme court, and it was after this defendant's positive*ly* refusal to carry up said appeal that Welborn and Turner, by some means unknown to this defendant, became parties to said proceedings, and an appeal by them was perfected, and the case carried to the supreme court of North Carolina, and while Judge Starbuck's decision was affirmed, the cost of said appeal was paid by Wilkes county. That this defendant was treasurer of Wilkes county for four years, and that he never heard of Welborn or Turner owning a county bond till about the time they became parties to said suit.

5. That this defendant can neither admit nor deny paragraph 17, but says, in reply thereto, that while the county of Wilkes, in addition to attorneys' fees, was to pay expenses of said attorneys in conducting said suit, and while said expense accounts had from time to time been filed, and allowed, and paid, at a special meeting

of the board of county commissioners, in November, 1898, an order was passed allowing Judge Avery $600.00 for expenses without filing any expense account, and when no expenses were then unpaid, said sum of $600 to be paid out of any funds in the treasurer's hands, except school funds and State taxes, and a claim was issued for said $600.00, and a demand was made on this defendant while treasurer of Wilkes county to pay said claim out of the bond fund then in his hands. That on the 1st Monday in December, 1898, a new board of commissioners took charge, and at their meeting in January, 1899, rescinded the $600 allowance to Judge Avery for expenses, and directed that notice be given to counsel to file itemized statement of said expenses, and at the February, 1890, meeting, the counsel for the county advised the county commissioners that, if forced to file an itemized statement of where the $600 was to be used, that it would show their *bond* to the bondholders, and could not at that juncture afford to do so, as this defendant is informed and believes, and whether for this cause or another, the order of $600 was reinstated and now stands on the claim book of Wilkes county, and affiant believes that, but for the temporary order issued in this cause, that said $600 would have been paid out of the bond funds. And defendant further says that, in conversation with P. A. Lomax, former chairman of the board of commissioners, affiant asked said chairman why they allowed the $600 without any account being filed therefor, and said chairman replied, "For reasons best known to ourselves."

98

6. That in answer to paragraph 26, this defendant says there is now no controversy between the parties therein referred to—this defendant has paid to his successor in office, J. H. Johnson, all of the bond fund, except the levy made in 1898, and this sum he is ready to pay when due, and while this defendant does not believe that his codefendants, of their own motion, would make way with the bond fund, still, unless restrained by this court, orders will be continually drawn upon J. H. Johnson, treasurer, or J. G. Hackett, State court receiver, and a good portion of this money will go in this way.

And this defendant, having fully answered, asks that such order be signed by your honor as will clearly define the duties of the defendants during the pendency of this litigation—such an order as will be a protection to the county officials, as well as to the bondholders.

Personally appeared Clarence Call, and makes oath that the facts set forth in the foregoing answer are true, except as to the matters stated on information and belief, and as to those matters he believes — to be true.

(Signed) C. CALL.

Subscribed and sworn to before me, April 11, 1899.

L. BUMGARNER,
Clerk Sup'r Court.

Endorsed: Filed in this office, April 12, 1899. Sam'l L. Trogdon, clerk.

99 *Answer of John H. Johnson.*

UNITED STATES OF AMERICA:

In the United States Circuit Court, Western District of North Carolina.

W. N. COLER, W. N. COLER, JR., BIRD S. COLER, JAMES W. Campbell, and Francis B. Coler, under the Name and Style of W. N. Coler and Company, Complainants,

vs.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY and CLARence Call, ex-Sheriff and *ex Officio and* ex-Treasurer, and John H. Johnson, Sheriff and Treasurer *ex Officio* of Wilkes Co., Respondents.

The defendant, John H. Johnson, now and at all times hereafter saving to himself all and all manner of benefit or advantage of exceptions or otherwise that can or may be had or taken to the many errors, uncertainties and the imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised is material or necessary for him to make answer to, answering says:

1.

That he has read the answer of his codefendant, The Board of Commissioners of Wilkes County, and that he is informed and believes the matters of defense and the facts stated in said answer are true, and this defendant adopts the said answer and prays that it may be treated as his own answer to each and every section of the bill of complaint.

2.

Further answering the said bill of complaint, this defendant says that he is informed and believes that the action entitled "The Board of Commissioners of Wilkes County and C. C. Wright *versus* Clarence Call and others," referred to in the bill of complaint as having been adjudicated in the supreme court of North Carolina, had been carried by writ of error to the Supreme Court of the United States, and that the said Supreme Court of the United States has held that the Federal courts are bound to follow the adjudications of the State courts in that case, and affiant is advised by
100 counsel, that if such had been the adjudication of said court the holders of one of the bonds in controversy having been parties to said action, questions involved in this cause and set forth in the bill of complaint as the plaintiffs' ground of complaint have been adjudicated, and the plaintiffs are estopped from denying that the bonds in controversy are invalid for want of authority in the said board of commissioners to issue them, and this defendant is further advised, informed and believes that after said action had been carried up by writ of error to said Supreme Court, and while

it was there pending, the superior court of Wilkes county, in the exercise of its rightful jurisdiction, and to the end that the fund mentioned in the bill of complaint as collected under a special levy to meet the interest on the bonds in controversy and as being in the hands either of the defendant Call or this defendant, be protected and preserved, to wit: the orders of the court to be made in pursuance of the adjudication of the Supreme Court of the United States, made, upon petition in said action, an order, which was signed by O. H. Allen, judge riding the judicial district in which Wilkes county is situated, and having rightful jurisdiction in the premises, by which order it was adjudged that Gordon Hackett, be appointed receiver to take charge of and hold under the direction of said superior court all funds that might be collected by the tax collector of Wilkes county as a special tax to meet the interest on said bonds.

3.

And this defendant is advised, informed and believes, that, upon the making of said order, a copy of which certified under the seal of the clerk of the superior court is hereto attached, marked Exhibit A, the said superior court acquired jurisdiction to appoint a receiver and to control the said fund as collected and to hold the same subject to the action of said higher court, and this defendant therefore, being so advised, specially avers and pleads that this court has no jurisdiction because the said court, which is one of concurrent jurisdiction, had already assumed control of the said fund before the bill of complaint was filed.

And this defendant is further advised, informed and believes the questions and issues involved in this controversy and set up as a cause of action or the grounds of the suit in the bill of complaint, has already been adjudicated finally by the Supreme Court of the United States upon the hearing on said writ of error, in which action the holders of one of said bonds had made themselves parties and had invited all other holders of said bonds to join them as par-
101 ties defendants, and that said adjudication has been made since the said bill of complaint was filed, and this defendant specially avers and pleads that the plaintiffs are estopped by the said adjudication and will be finally estopped upon the rendition of a final judgment in the superior court of Wilkes county upon the coming down of the certificate therein, and this defendant prays the court to continue this cause until the coming down of said certificate, to the end that he may be enabled to properly plead as a defense that the questions and issues involved in this controversy have been so finally adjudicated and that the plaintiffs are estopped.

And this defendant denies all and all manner of unlawful combination and confederacy, wherewith he is by the said bill charged, without this, that there is any other matter, cause, or thing in the said plaintiffs' said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered, confess-, traversed and avoided or denied, is true to the knowledge or belief of this defendant;

all which matters and things this defendant is ready and willing to aver, maintain, and prove, as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

JOHN H. JOHNSON.
A. C. AVERY,
T. J. DULA,
FINLEY & GREEN,
Attorneys.

John H. Johnson, being duly sworn, maketh oath, that he is the defendant above named, and that so much of the foregoing answer as concerns his own acts and deeds, is true, to the best of his own knowledge; and so much thereof as concerns the acts or deeds of any other person or persons, he believes to be true.

JOHN H. JOHNSON.

Sworn to and subscribed before me this 3rd day of April, 1899, as witness my hand and seal of office.

L. BUMGARNER, *C. S. C.*,
By H. T. SMOOK, *D. C.*

Endorsed: Filed in this office April 13th, 1899. Sam'l L. Trogdon, clerk.

102 *Replication to Answer of the Board of Commissioners.*

United States Circuit Court, Western District of North Carolina.

GREENSBORO, N. C., *April 12th*, 1899.

W. N. COLER, W. N. COLER, JR., BIRD S. COLER, JAMES W. Campbell, and Francis W. Coler, Bankers, under the Name and Style of W. N. Coler & Company, Compl'ts,
vs.
THE BOARD OF COMMISSIONERS OF WILKES COUNTY and Clarence Call, ex-Sheriff and *ex Officio* ex-Treasurer, and John H. Johnson, Sheriff and *ex Officio* Treasurer of Wilkes County, Respondents.
} In Equity.

Replication.

The complainants come and file this their replication to the answer of the respondent, The Board of Commissioners of Wilkes County, and say:

1. That they reiterate and affirm their allegations contained in their original bill.

2. That the allegations contained in the answer of the respondent, denying the allegations, or any of the same, and matters and things set out in complainants' bill are not true.

3. That the allegations of matters and things, as set out in the

answer of said respondent, not in denial of the allegations in the bill, but set up as a defense, are not true, and are denied.

4. That denying the allegations of respondent, and reiterating the allegations contained in the bill, complainants are ready to prove the truth of the matters and things, entitling them to the relief demanded in the bill.

CHAS. PRICE,
Solicitor for Compl'ts.

Chas. Price, being sworn according to law, says that he is the attorney and solicitor of the complainants, and that this replication is true.

CHAS. PRICE.

103 Sworn to and subscribed before me this 12th day of April, 1899.

(Signed) JOHN L. RANDLEMAN,
[SEAL.] *Notary Public.*

Endorsed: Filed in this office April 20th, 1899. Sam'l L. Trogdon, clerk.

Replication to Answer of Clarence Call.

United States Circuit Court, Western District of North Carolina.

GREENSBORO, N. C., *April 12th*, 1899.

W. N. COLER, W. N. COLER, JR., BIRD S. COLER, JAMES W. Campbell, and Francis W. Coler, Bankers, under the Name and Style of W. N. Coler & Co., Complainants,
vs.
THE BOARD OF COMMISSIONERS OF WILKES CO. and Clarence Call, ex-Sheriff and *ex Officio* ex-Treasurer, and John H. Johnson, Sheriff and *ex Officio* Treasurer, of Wilkes County, Respondents. } In Equity.

Replication.

The complainants come and file this their replication to the answer of the respondent, Clarence Call, and says:

1. That they reiterate and affirm their allegations contained in their original bill.

2. That the allegations contained in the answer of the respondent, denying the allegations or any of the same, and matters and things set out in complainants' bill are not true.

3. That the allegations of matters and things, as set out in the answer of said respondent, not in denial of the allegations in the bill, but set up as a defence, are not true, and are denied.

4. That in denying the allegations of respondent and reit-
104 erating the allegations contained in the bill, complainants are

ready to prove the truth of the matters and things entitling them to the relief demanded in the bill.

CHAS. PRICE,
Solicitor for Compl'ts.

Charles Price, being sworn according to law, says that he is the attorney and solicitor of the complainants, and that this replication is true.

CHAS. PRICE.

Sworn to and subscribed before me this 12th day of April, 1899.
[SEAL.] J. L. RANDLEMAN,
Notary Public.

Endorsed: Filed in this office, April 20th, 1899. Sam'l L. Trogdon, clerk.

Replication to Answer of John H. Johnson.

United States Circuit Court, Western District of North Carolina.

GREENSBORO, N. C., *April* 12, 1899.

W. N. COLER, W. N. COLER, JR., BIRD S. COLER, James W. Campbell, and Francis W. Coler, Bankers, under the Name and Style of W. N. Coler & Co., Comp'lts,
vs.
THE BOARD OF COMMISSIONERS OF WILKES CO. and Clarence Call, ex-Sheriff and *ex Officio* ex-Treasurer, and John H. Johnson, Sheriff and *ex Officio* Treasurer of Wilkes County, Respondents.
} In Equity.

Replication.

The complainants come and file this their replication to the answer of the respondent, John H. Johnson, and says:

1. That they reiterate and affirm their allegations contained in their original bill.

2. That the allegations contained in the answer of the re-
105 spondent denying the allegations or any of the same, and matters and things set out in complainants' bill are not true.

3. That the allegations of matters and things, as set out in the answer of said respondent, not in denial of the allegations in the bill, but set up as a defence, are not true, and are denied.

4. That in denying the allegations of respondent, and reiterating the allegations contained in the bill, complainants are ready to prove the truth of the matters and things entitling them to the relief demanded in the bill.

CHAS. PRICE,
Solicitor for Complainants.

Charles Price, being sworn according to law, says that he is the attorney and solicitor of the complainants, and that this replication is true.

CHAS. PRICE.

Sworn to and subscribed before me this 12th day of April, 1899.
[SEAL.] J. L. RANDLEMAN,
Notary Public.

Endorsed: Filed in this office April 20th, 1899. Sam'l L. Trogdon, clerk.

Affidavit of L. C. Jennings.

UNITED STATES OF AMERICA:

In the Circuit Court of the United States, Western District North Carolina.

COLER & COMPANY
vs.
THE BOARD OF COMMISSIONERS OF WILKES COUNTY ET AL.

L. C. Jennings maketh oath:

1st. That he is one of the commissioners of Wilkes county, and was conducted into office on the first Monday in December, A. D. 1898.

2nd. That at the regular January meeting of the board, the first meeting held after the meeting at which the new board was
106 organized, and, in the absence of the chairman of the board, John P. Peden, the defendant Call appeared before the board, and advised them that it was their duty to pay off the bill of costs against J. M. Turner and J. M. Welborn, sent down from the Supreme Court, which he said that he had paid, relying on having it allowed in his settlement, as retiring sheriff of the county, and being inexperienced, the board confided in Call's representation as to their duty, and credited him with the amount of said bills.

3rd. That affiant has reason to believe, and does believe now, that said Call abused the confidence of the officers, just inducted into office and who were his personal and political friends and associates, in furtherance of a scheme to hatch up a charge of collusion, as he has done in his answer.

4th. That at said meeting in January, B. S. Call, the brother and former partner in business of the defendant, Clarence Call, and his uncle, E. O. Masten, approached affiant as an individual, and said B. S. Call appeared before the board at said January meeting, and both argued that the order auditing a claim of A. C. Avery, as attorney, of $600 should be rescinded and notice issued to said Avery, and through such influences the board were induced to rescind said order, which was reinstated and the rescinding order stricken out at a subsequent meeting.

5th. That affiant now has reason to believe and does believe that said advice was given at the instance of persons interested adversely to the board, in the pending and proposed litigation, as to the validity of the bonds and with the view of preventing the county from testing their validity.

6th. That, as affiant is informed and believes, on the day that counsel came to Wilkesboro, in December, 1897, to meet the former board of commissioners, the defendant, Clarence Call, sent a telegraphic message to Henry W. Miller, chief clerk of A. B. Andrews, vice-president of the Southern Railway Company, who has been in the habit of collecting the interest on the bonds in controversy, warning the said Miller to collect the special-tax fund then in his hands as *ex officio* treasurer of the courts, and that said Miller accordingly sent or came for said fund before any restraining order was issued.

7th. That, as affiant is informed and believes, the defendant, Call, stated boastingly that he had been represented, without
107 charge of any fee, by Mr. Lindsey Patterson, who was counsel for the holder or holders of some of the bonds in controversy, in the courts of the State and acted on his advice in the conduct of the case pending in the superior court and refusing to appeal from the decision of Judge Starbuck.

8th. That affiant denies the charge that there has ever been any purpose or agreement on the part of the present board of commissioners and Gordon Hackett to induce the judges of the superior court to countenance the wasting or misapplication of the fund collected as a special tax, but affiant is informed and believes that the defendant, Call, proposes to apply to the circuit court of the United — for the place of receiver, should the court determine to appoint one in this cause.

L. C. JENNINGS.

Sworn to and subscribed before the undersigned, this the 13th day of April, A. D. 1899.

SAM'L L. TROGDON, *Clerk.*

Endorsed: Filed in this office, April 13th, 1899. Sam'l L. Trogdon, clerk.

Affidavit of P. A. Lomax.

UNITED STATES OF AMERICA,
Western District of North Carolina.

In the United States Circuit Court.

W. N. COLER, W. N. COLER, JR., BIRD S. COLER, JAMES W. CAMPbell, and Francis B. Coler, under the Name and Style of W. N. Coler and Company, Complainants,

vs.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY and CLARENCE Call, ex-Sheriff and *ex Officio and* ex-Treasurer, and John H. Johnson, Sheriff and Treasurer *ex Officio* of Wilkes County, Respondents.

P. A. Lomax maketh oath before the undersigned, after being duly sworn,

1st. That he served as a member of the board of commis-
108 sioners of Wilkes county for the term expiring on the 1st Monday in December, A. D. 1898, when the present board of commissioners for said county were inducted into office.

2nd. That the said board of commissioners, of which affiant was a member as aforesaid, did not agree to pay the expenses incurred by J. M. Turner and J. M. Welburn as defendants in the action, originally instituted against Clarence Call, and wherein said Turner and Welburn were made defendants, as affiant is informed has been alleged by the plaintiffs in the above-entitled cause, and that said board did not pay to the said Turner and Welburn any sum of money to defray such expenses.

P. A. LOMAX.

Sworn to and subscribed before the undersigned, this the 31st day of March, 1899, as witness his hand and seal of office.

T. M. BYRD,
J. P., Wilkes County.

STATE OF NORTH CAROLINA,
Wilkes County.

Superior Court.

I, Linville Bumgarner, clerk of the superior court in and for the county and State aforesaid, do hereby certify that T. M. Byrd, whose genuine signature appears to the abo e certificate, is, and was at the time of signing the same, an acting justice of the peace in and for Wilkes county, and duly qualified according to law.

Witness my hand and the seal of said court, this 3rd day of April, 1899.

LINVILLE BUMGARNER,
Clerk Superior Court.

Endorsed: Filed in this office, April 13th, 1899. Sam'l L. Trogdon, clerk.

109 *Affidavit of R. P. Yates.*

UNITED STATES OF AMERICA,
Western District of North Carolina.

In the United States Circuit Court.

W. N. COLER, W. N. COLER, JR., BIRD S. COLER, JAMES W. CAMPbell, and Francis B. Coler, under the Name and Style of W. N. Coler and Company, Complainants,
versus
THE BOARD OF COMMISSIONERS OF WILKES COUNTY and CLARENCE Call, ex-Sheriff and *ex Officio and* ex-Treasurer, and John H. Johnson, Sheriff and Treasurer *ex Officio* of Wilkes County, Respondents.

R. P. Yates maketh oath before the undersigned, after being duly sworn:

1st. That he served as a member of the board of commissioners of Wilkes county for the term expiring on the 1st Monday in December, A. D. 1898, when the present board of commissioners for said county were inducted into office.

2nd. That the said board of commissioners, of which affiant was a member as aforesaid, did not agree to pay the expenses incurred by J. M. Turner and J. M. Welburn as defendants in the action, originally instituted against Clarence Call, and wherein said Turner and Welburn were made defendants, as affiant is informed has been alleged by the plaintiffs in the above-entitled cause, and that said board did not pay to the said Turner and Welburn any sum of money to defray such expense.

R. P. YATES.

Sworn to and subscribed before the undersigned, this the 27th day of March, 1899, as witness his hand and seal of office.

SIDNEY SWANSON, *J. P.*

STATE OF NORTH CAROLINA,
Wilkes County.

Superior Court.

110 I, Linville Bumgarner, clerk of the superior court, in and for the county and State aforesaid, do hereby certify that Sidney Swanson, whose genuine signature appears above is, and was at the time of signing the same, an acting justice of the peace in and for Wilkes county, and duly qualified according to law.

Witness my hand and the seal of said court, this 28th day of March, 1899.

LINVILLE BUMGARNER, *C. S. C.*

Endorsed: Filed in this office April 13, 1899. Sam'l L. Trogdon, clerk.

Affidavit of C. C. Wright.

UNITED STATES OF AMERICA, }
Western District of North Carolina. }

In the United States Circuit Court.

W. N. COLER, W. N. COLER, JR., BIRD S. COLER, JAMES W. Campbell, and Francis B. Coler, under the Name & Style of W. N. Coler and Company, Complainants,

versus

THE BOARD OF COMMISSIONERS OF WILKES COUNTY and CLARENCE Call, ex-Sheriff and *ex Officio and* ex-Treasurer, and John H. Johnson, Sheriff and Treasurer *ex Officio* of Wilkes County, Respondents.

C. C. Wright maketh oath before the undersigned, after being duly sworn:

1st. *The* he served as a member of the board of commissioners of Wilkes county for the term expiring on the 1st Monday in December, A. D. 1898, when the present board of commissioners for said county were inducted into office.

2nd. That the said board of commissioners, of which affiant was a member as aforesaid, did not agree, to his knowledge, to pay the expenses incurred by J. M. Turner and J. M. Welborn as defendants in the action, originally instituted against Clarence Call, and wherein said Turner and Welburn were made defendants, as affiant is informed has been alleged by the plaintiffs in the above-entitled cause, and that said board did not pay to the said Turner and Welburn any sum of money to defray such expense.

C. C. WRIGHT.

111 Sworn to and subscribed before the undersigned, this the 5th day of April, 1899, as witness his hand.

RUFUS TRANSON, *J. P.*

NORTH CAROLINA, }
Wilkes County. }

I hereby certify that Rufus Transon, whose genuine signature appears to the above jurat is, and was at the time of signing the same, a justice of the peace of Wilkes county, and that his official acts are entitled to credit.

Witness my hand and the seal of said court this April 6th 1899.

L. BUMGARNER, *C. S. C.*,
By H. T. SMOOK, *D. C.*

Endorsed: Filed in this office April 13th, 1899. Sam'l L. Trogdon, clerk.

Affidavit of W. C. Myers.

UNITED STATES OF AMERICA,
Western District of North Carolina.

In the United States Circuit Court.

W. N. COLER, W. N. COLER, JR., BIRD S. COLER, JAMES W. Campbell, and Francis B. Coler, under the Name and Style of W. N. Coler and Company, Complainants,
versus
THE BOARD OF COMMISSIONERS OF WILKES COUNTY and CLARENCE Call, ex-Sheriff and *ex Officio and* ex-Treasurer, and John H. Johnson, Sheriff and Treasurer *ex Officio* of Wilkes County, Respondents.

W. C. Myers maketh oath before the undersigned, after being duly sworn:

1st. That he served as a member of the board of commissioners of Wilkes county for the term expiring on the 1st Monday in December, A. D., 1898, when the present board of commissioners for said county were inducted into office.

2nd. That the said board of commissioners, of which
112 affiant was a member as aforesaid, did not agree to pay the expenses incurred by J. M. Turner and J. M. Welburn as defendants in the action, originally instituted against Clarence Call, and wherein said Turner and Welburn were made defendants, as affiant is informed has been alleged by the plaintiffs in the above-entitled cause, and that said board did not pay to the said Turner and Welburn any sum of money to defray such expense.

W. C. MYERS.

Sworn to and subscribed before the undersigned, this the 1st day of April, 1899, as witness his hand and seal of office.

N. E. MOORE,
J. P., Wilkes County.

STATE OF NORTH CAROLINA,
Wilkes County.

Superior Court.

I, Linville Bumgarner, clerk of the superior court in and for the county and State aforesaid, do hereby certify that N. E. Moore, whose genuine signature appears to the above certificate, is, and was at the time of signing the same, an acting justice of the peace in and for the county of Wilkes, and duly qualified according to law.

Witness my hand and the seal of said court, this 3rd day of April, 1899.

LINVILLE BUMGARNER, *C. S. C.*

Endorsed: Filed in this office, April 13, 1899. Sam'l L. Trogdon, clerk.

Affidavit of J. M. Turner.

UNITED STATES OF AMERICA,
Western District of North Carolina.

W. N. COLER AND COMPANY
vs.
THE BOARD OF COMMISSIONERS OF WILKES COUNTY & Others.

J. M. Turner maketh oath before the undersigned, after being duly sworn:

113 1st. That he is informed, that in the above-entitled cause it has been alleged that affiant and J. M. Welburn are not the owners of a certain bond, by virtue of which they became parties defendant in an action brought in the superior court of Wilkes county.

2nd. That the said allegations is not true and that affiant and said Welburn are the joint owners of the said bond.

J. M. TURNER.

Sworn to and subscribed before me this the 7th day of March, A. D. 1899, as witness my seal of office.

[SEAL.]

L. BUMGARNER, *C. S. C.*,
By C. H. COLVARD, *D. C.*

Endorsed: Filed in this office, April 13, 1899. Sam'l L. Trogdon, clerk.

Affidavit of Charles Price.

Chas. Price, being duly sworn according to law, says that he was the master who sold under the decree of foreclosure and sale, passed by the circuit court of the United States, the North Western North Carolina railroad, and conducted the sale of the same in person, the Hon. Theodore F. Klutz, of Salisbury, N. C., being the crier, and before the sale the Hon. Robert M. Douglass protested against the same in writing, and in his proper person as he did, also, against the confirmation of the sale before Judge Simonton, at Salisbury, N. C.

CHAS. PRICE.

Sworn to and subscribed before me this 12th day of April, 1899.

SAM'L L. TROGDON, *Clerk.*

114 *Agreement of Counsel Accepting Service of Citation and Extending Time for Preparing Record.*

Circuit Court of the United States, Western District of North Carolina, Fourth Circuit. In Equity.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY, Appellants,
vs.
W. N. COLER AND COMPANY, Appellees.

It is agreed by counsel in the above-entitled cause that counsel for the complainants will at once accept service of a citation on appeal, and that the time for preparing the record on appeal be extended to July 1st, A. D., 1899.

CHAS. PRICE,
Sol. — Complainants.
A. C. AVERY,
Sol. for Defendants.

Endorsed: Filed in this office April 21, 1899. Sam'l L. Trogdon, Clerk.

Agreement of Counsel for Appellees to Allow Time to Perfect Appeal.

Circuit Court of the United States, Western District of North Carolina, Fourth District. In Equity.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY and J. H. Johnson, Sheriff and *ex Officio* Treasurer of Wilkes County, Appellants,
vs.
W. N. COLER AND COMPANY, Appellees.

Agreement of counsel for appellees to allow time to perfect appeal.

It is hereby agreed that the solicitors for the appellants in the above-entitled cause shall be allowed further time until the
115 1st day of July, A. D. 1899, to perfect their case on appeal to the United States circuit court of appeals *to* the fourth *district* at the city of Richmond.

CHAS. PRICE,
Solicitor for Appellees.
A. C. AVERY,
Solicitor for Appellants.

This the 25th of April, A. D. 1899.

Endorsed: Filed in this office May 8th 1899. Sam. L. Trogdon, clerk.

Agreement of Counsel as to Record and Opinion.

Circuit Court of the United States, Western District of North Carolina, Fourth Circuit. In Equity.

THE BOARD OF COMMISSIONERS OF WILKES County and J. H. Johnson, Sheriff and *ex Officio* Treasurer of Wilkes County, Appellants,
vs.
W. N. COLER AND COMPANY, Appellees.
} Agreement of Counsel.

Counsel for the complainants, Coler and Company, having offered in evidence on the hearing the printed transcript of record lately filed in the Supreme Court of the United States, in the case of J. M. Turner and J. M. Welburn, plaintiffs in error, *versus* The Board of Commissioners of Wilkes County, to show a discrepancy in the language of the opinion of the court sent up as a part of said record, and the opinion of the court as published in the North Carolina Reports, — is now agreed by counsel that the following language appears in said opinion as printed in said transcript of record, to wit:

"Enough appears to indicate, what is common knowledge, that the railroad does not touch the county of Wilkes, and that the stock for which these bonds were issued has been swept away in the maealsstrom of corporate reorganization," and that in lieu of said language the following sentence is substituted in the opinion of the court in said action, as published on page 326 of volume 123 of the N. C. Report-, to wit:

"Enough appears to indicate, what is common knowledge,
116 that the stock for which these bonds were issued has been swept away in the maealstrom of corporate reorganization."

It is further agreed by counsel to constitute a part of the record on appeal in the above-entitled cause,

1st. That an action was brought by J. M. Turner, E. Wallace and other, tax-payers of Wilkes county, *versus* The Richmond and Danville Railroad Company, The Northwestern North Carolina Railroad Company and The Board of Commissioners of Wilkes County, returnable to the fall term of the superior court of Wilkes county, A. D. 1893, for the purpose of compelling defendants by mandamus to build and construct the Northwestern North Carolina railroad across the Yadkin river from North Wilkesboro to Wilkesboro, a distance of about one mile, and that the plaintiffs in said action submitted to judgment of nonsuit which was rendered at the fall term 1895, of said superior court.

2nd. It is further admitted and agreed between counsel that it may appear as a part of the record on appeal that an action was brought by Jessie M. Douglas and others as plaintiffs against The Northwestern North Carolina Railroad Company and others as defendants, returnable to the superior court of Guilford county at the June term 1888, for the purpose of preventing and restraining the

Northwestern North Carolina Railroad Company from issuing mortgage bonds constituting a lien upon the completed road of said company to *and* in the extension of its line.

3rd. That when the franchise and property of the Northwestern North Carolina Railroad Company was offered for sale under a decree of foreclosure made by the circuit court of the United States by the special master named in said decree at Winston, in the year 1894, R. M. Douglas, the justice who delivered the opinion of the court contained in said transcript was present and for and on behalf of his wife, as a stockholder, forbade said sale in writing, and appeared before the circuit judge and opposed the granting of the decree confirming said sale.

It is agreed that the certified extracts from the Journals of the Legislative House of North Carolina, contained in the record of the proceedings in the superior court of Wilkes county and in the supreme court of North Carolina, filed as an exhibit to the supplemental answer, present a correct history of legislative action in reference to the amendments to the charter of the Northwestern North Carolina Railroad Company, ratified, respectively, at
117 the sessions of said legislature in 1879 and 1881, and that the copies of said legislative proceedings offered at the hearing need not be sent up, except the extracts from the Journals of the House of Representatives at the special session of 1868, in reference to the private act ratified August 11th, 1868, which, with the other said amendments is filed as an exhibit to the complaint.

It is further agreed that the opinion of Judge Purnell as published in the Federal Reporter (volume 90) filed in Union Bank *vs.* Town of Oxford and which is to be adopted as the opinion in this case, need not be sent up as part of the record.

It is further agreed, that the affidavits contained in the exhibit filed with the supplemental answer be considered as offered at the hearing.

CHAS. PRICE,
Sol. — Complain-ts.
A. C. AVERY,
Sol. for Respondents.

Endorsed: Filed in this office, April 21, 1899. Sam'l L. Trogdon, clerk.

Agreement of Counsel as to Assignment of Errors, Record, and Waiving Notice of Appeal.

UNITED STATES OF AMERICA,
Western District of North Carolina.

COLER AND COMPANY
vs.
THE BOARD OF COMMISSIONERS OF WILKES COUNTY and Others.

In this cause it is agreed that in the assignment of errors counsel for the defendants may treat the opinion of the court in Union Bank of

Richmond *vs.* The Commissioners of Oxford as the opinion in this case, and may assume in addition that the court will hold both the original charter of the Northwestern Railroad Company, and Code of North Carolina, sections 1996 to 2000, inclusive, as authority sufficient to empower the commissioners of Wilkes to create the bonded debt in controversy.

118 It is further agreed that the complainants, counsel waives all notice of appeal.

It is further agreed that both parties may use the copies of affidavits filed as exhibit to the answer as well as affidavits filed in this cause, and that a bond of five hundred dollars on appeal shall be sufficient and that the complainants may rely on the statutes filed as exhibits to the bill as evidence of what are the statutes of North Carolina.

A. C. AVERY,
For Defendants.
CHAS. PRICE,
Sol. for Complainants.

Endorsed: Filed in this office, April 13th, 1899. Sam'l L. Trogdon, clerk.

Final Decree.

United States Circuit Court, Western District of North Carolina, Greensboro, N. C., April 13th, 1899. In Equity.

W. N. COLER AND COMPANY, Complainants,
vs.
THE BOARD OF COMMISSIONERS OF WILKES CO. and Clarence Call, ex-Sheriff and *ex Officio* ex-Treasurer, and John H. Johnson, Sheriff and *ex Officio* Treasurer of Wilkes County, Respondents. } Final Decree.

This cause coming on to be heard upon the bill, answers, replications and former orders, exhibits and other evidence in the cause, and being debated by counsel, the court doth declare: that the bonds issued by the county of Wilkes in aid of the building of the Northwestern North Carolina railroad, mentioned in the bill, are valid obligations of the county of Wilkes, and were purchased by the complainants for value, and that they are the lawful holders of the same. The court doth further declare that the respondents, Clarence Call, ex-sheriff and *ex officio* ex-treasurer, and John H. Johnson, sheriff and *ex officio* treasurer of Wilkes county, are the lawful trustees of the said bondholders, and hold the sum of thirteen thousand

119 dollars, $13,000, mentioned in the bill, as such trustees, under and by virtue of the law and orders of the board of commissioners of Wilkes county, for the benefit of said bondholders, and for the sole purpose of paying off and discharging the interest due on the said bonds, as set out in the bill. And now it is therefore ordered and decreed that Kerr Craige be, and is, appointed a receiver for said sum of thirteen thousand dollars; and that the said Call and

Johnson, ex-treasurer and treasurer, as aforesaid, pay over to him forthwith the said sum or any such part of the same as may be in their hands, and that the said board of commissioners of Wilkes county are enjoined from in any manner interfering with the execution and performance of this decree. It is further ordered and decreed that the said receiver, Kerr Craige, enter into bond in the sum of twenty thousand dollars, the same to be approved by this court, for the faithful performance of the duties of his receivership.

It is further ordered and decreed that the said receiver hold the said sum of thirteen thousand dollars until the further order of this court.

It is further ordered and decreed that the clerk of this court certify this decree to the said receiver and to the respondents, to wit: the board of commissioners of Wilkes county, and the said ex-treasurer and treasurer, Call and Johnson.

THOS. R. PURNELL,
United States Dist. Judge, Presiding in the Circuit Court of the Western Dist. of N. C., by Designation of the Circuit Judge of This the 4th Circuit of the United States, and Sec. 906, R. S.

Endorsed: Filed in this office, Apr. 14th, 1899. Sam'l L. Trogdon, clerk.

120 *Petition for Appeal.*

Circuit Court of the United States, Western District of North Carolina, Fourth District. In Equity.

THE BOARD OF COMMISSIONERS OF WILKES County and J. H. Johnson, Sheriff and *ex Officio* Treasurer of Wilkes County, Appellants,
vs.
W. N. COLER AND COMPANY, Appellees.
} Petition on Appeal.

The above-named, The Board of Commissioners of Wilkes County and John H. Johnson, sheriff and *ex officio* treasurer, who were defendants in the suit begun by original bill by appellees above named, conceiving themselves aggrieved by the decree made and entered on the 13th day of April, A. D. 1899, in said cause, do hereby appeal from the said order and decree entered in favor of the appellees, above named, in the circuit court at Greensboro, by Hon. Thomas R. Purnell, judge presiding, on said 13th day of April, to the United States circuit court of appeals for the fourth circuit, and they pray that this appeal may be allowed, and that a transcript of the record of proceedings and papers upon which said order or decree is made, duly authenticated, may be sent to the circuit court of appeals of the fourth judicial circuit of the United States.

A. C. AVERY,
FINLEY & GREEN,
T. J. DULA,
Attorneys for Appellants.

Dated April 18th, 1899.

Order Allowing Appeal.

The foregoing claim of appeal is allowed.

THOM. R. PURNELL,
U. S. Judge, &c.

Endorsed: Filed in this office, May 2nd, 1899. Sam'l L. Trogdon, clerk.

121 *Assignment of Errors.*

The Circuit Court of the United States for the Western District of North Carolina, at Greensboro.

W. N. COLER, W. N. COLER, JR., BIRD S. Coler, James W. Campbell, and Francis Coler, Bankers, under the Name and Style of Coler and Company, Appellees,
vs.
THE BOARD OF COMMISSIONERS OF WILKES County, Clarence Call, ex-Sheriff and *ex Officio* ex-Treasurer of Wilkes County, and John H. Johnson, Treasurer of Wilkes County, Appellants.
} Assignment of Errors.

And, now, on the 30th day of June, A. D., 1899, came the said The Board of Commissioners of Wilkes County, and John H. Johnson, treasurer of Wilkes county, by A. C. Avery, Finley and Green, and T. J. Dula, their solicitors, and say, that the decree in said cause, entered at *at* Greensboro, on the 15th day of April, A. D., 1899, is erroneous and against the just rights of the said defendants, appellants, for the following reasons:

First. Because it appeared from the cases of Union Bank *vs.* The Board of Commissioners, 116 N. C., 339, Belo *vs.* Commissioners, 76 N. C. Rep., 489, and Hill *vs.* Commissioners, 67 N. C. R., 367, and Commissioners of Wilkes *vs.* Call, 123 N. C. R., 308, 322, 328, which were introduced, and from other evidence, that it had not been shown upon the trial of said cases of Union Bank *vs.* The Board of Commissioners, Belo *vs.* The Commissioners of Forsyth County, or Hill *vs.* The Commissioners of Forsyth County, or upon appeal in either of said causes, in the supreme court of North Carolina, that the statute enacted August 11th, 1868, which was attached to the complaint as an exhibit, had failed to pass both houses of the General Assembly of the State of North Carolina, in accordance with the requirements of the constitution of said State, art. 2, sec. 14, whereas it appeared on the hearing of this cause that the said amendment to the charter purporting to have been enacted on the 11th day of August, A. D., 1868, was no law, for the reason that it failed to pass both houses of said General Assembly, as required by said
122 section of said constitution, and because the court, in referring to the opinion in Union Bank of Richmond *vs.* The Board of

Commissioners of Oxford *et al.*, as embodying the reasons upon which the opinion of the court was founded erroneously held, in effect, that the commissioners of Wilkes county contracted to pay the bonds in question in contemplation of a decision of the supreme court of North Carolina recognizing the validity of said act of August 11th, 1868.

Second. Because the evidence showed that the contract held to be valid in said case of Belo *vs.* The Commissioners of Forsyth County, 76 N. C. Rep., 489, was entered into before the constitution of North Carolina, into which for the first time *was* incorporated the provisions of said sec. 14, art. 2, was ratified on the 24th of April, A. D., 1868, and when there was no such restrictive requirement in force as a part of the organic law of the State, and the court erred in following the ruling in said case of Union Bank of Oxford *vs.* The Board of Commissioners of Oxford *et al.*, as was declared by the court, in that the contract held to be valid by the supreme court of North Carolina in said case of Belo *vs.* The Commissioners of Forsyth County, was entered into, not in contemplation of the provisions of said section 14, art. 2, of the constitution of North Carolina but before said section became a part of the organic law of said State.

Third. Because the court erroneously held that the bonds in controversy were "valid obligations of the county of Wilkes," when it appeared in evidence that the defendants relied, as authority for issuing such bonds, upon the five statutory provisions attached as Exhibits A, B, C, D, E and G to the complaint, to wit:

1st. (Exhibit A.) An ord-nance of the constitutional convention of 1868, incorporating the Northwestern North Carolina Railroad Company, ratified March 9th, 1868, the authority thereby conferred on the counties (if any power was delegated) having been revoked by the ratification of the constitution of North Carolina on the 22nd to the 24th of April, 1868, incorporating for the first time the provisions of article 7, section 7, and of article 5, sections 1, 5, 6 and 7, and the bonds having been issued (see Exhibit E) on October 1st, 1889.

2nd. (Exhibit B.) An act of the legislature ratifying and confirming the said charter, enacted August 11th, 1868, which, as appeared in the evidence, failed to pass both houses of the General Assembly, as required by the constitution, art. 2, section 14,
123 ratified April 22nd to April 24th, 1868, prior to the passage of said art. 3rd, (Exhibit C) section 1996 of the Code of North Carolina, it appearing in evidence that the said section, as construed with sections 1999 and 2000 of said code, was insufficient as authority for issuing the bonds, under the construction placed on sections 1, 5, 6, 7 of article 5 of the constitution of North Carolina, prior to the issuing of said bonds, by the supreme court of said State, in the cases of Barksdale *vs.* Commissioners, 93 N. C. R., 472, 475, and Gallaway *vs.* Chatham Railroad Company, 63 N. C. R., 147, 155, 156, 158 (both of which opinions were relied upon on the hearing).

4th. (Exhibit D.) Section 1997 of the Code of North Carolina, it being shown to be a part of the same statute, as said sections 1996, 1999 and 2000, which construed together failed to confer authority to

create the bonded debt under the prior rulings in said cases of Barksdale *vs.* The Commissioners, and Gallaway *vs.* Commissioners.

5th. (Exhibit- E and G.) Chapter 43, Laws of 1879, ratified February 20th, 1879, and chapter 156, Laws of 1881, ratified March 2, 1881, it being shown in evidence that both said amendments of 1879 and of 1881 to the charters of said Northwestern North Carolina Railroad Company, failed to pass both houses of the General Assembly in accordance with the requirements of section 14, article 2 of the constitution of North Carolina.

Fourth. Because it appeared before the court on the hearing that the supreme court of North Carolina, in the case of The Commissioners of Wilkes County *vs.* Clarence Call and others, 123 N. C. R., 308, had held that the bonds in controversy were not valid for want of authority in said county to issue them, and that the said supreme court had previously, in the case of Bank *vs.* Commissioners, 119 N. C. R., 214; Commissioners *vs.* Snuggs, 121 N. C., 394; Rodman *vs.* Washington, 122 N. C. R., 39' and Commissioners *vs.* Payne, 123 N. C. R., 432, held other municipal bonds invalid, when the same questions were involved, and the court erroneously overruled said decisions instead of following the construction given by said supreme court to the constitution and statutes of said State, and erroneously assigned as a reason for said ruling that the same question had been previously adjudicated in the case of Union Bank *vs.* Commissioners of Oxford, 116 N. C. —, when the question whether the statute relied on as authority for issuing the municipal bonds had passed in accordance with the requirements of art. 2, sec 14, of the constitution of North Carolina had not been raised in said last-named case.

124 Fifth. Because the court erroneously overruled and failed to follow the ruling of the supreme court of North Carolina in the case of Commissioners *vs.* Call, 123 N. C., 308, erroneously holding that the decision in Broadnax *vs.* Groom, 64 N. C., 244, was a ruling in favor of the right to create such bonded indebtedness, and that after the contract creating the bonded debt in controversy was entered into in view of said decision, it was overruled by said decision in Commissioners *vs.* Call, as will appear from the opinion in Union Bank of Richmond *vs.* The Board of Commissioners of Oxford — Fed. Reports, referred to by the judge as giving the grounds of his ruling in the cause.

Sixth. Because it appeared on the hearing that the case of The Commissioners of Wilkes *vs.* Clarence Call, 123 N. C., 308, had been taken by writ of error to the Supreme Court of the United States, where it was held that the court had no jurisdiction to review a decision of the highest judicial tribunal of a State construing its constitution and laws, and because the courts of North Carolina had exclusive jurisdiction to hear and try actions brought by all holders of said bonds residing within said State, and in holding that non-resident holders of such bonds had any other or different remedy or right, the court did not extend to all holders of such bonds the equal protection of the law.

Seventh. Because the court held that the bonds in controversy

were "valid obligations" of Wilkes county, and referred to the reasoning in the decision in Union Bank of Richmond *vs.* The Board of Commissioners of Oxford, and thereby erroneously predicated the ruling that said bonds were valid upon the ground that the case of Carr *vs.* Coke, 116 N. C., 223, and Broadnax *vs.* Groom, 64 N. C., 224, 247, were previous decisions of the supreme court of North Carolina, in which the court, prior to the decision in Bank *vs.* Commissioners, 119 N. C., 214, had held that the courts could not look behind the signatures of the presiding officers of the two houses of the General Assembly, and examine the journals, as to any class of statutes, in passing upon the question whether they had been enacted in the mode prescribed by the constitution.

Eighth. Because the court erroneously held that the bonded debt created by the county of Wilkes was a valid debt or obligation, and that the board of commissioners of Wilkes county was authorized by law to create said debt, at the time when the bonds were issued, on October 1st, 1889, and erroneously referred in support of
125 said ruling, to the previous decision, in the circuit court of the eastern district of North Carolina, in the case of Union Bank of Richmond *vs.* The Board of Commissioners of Oxford, Fed. Rep., wherein a similar ruling was erroneously predicated in part upon the decision of the supreme court of North Carolina, in Gatlin *vs.* The Town of Tarboro (78 N. C., 119, 123).

Ninth. Because the ruling of the court that the bonds in controversy *was* erroneous, in that it was based upon the erroneous view of the law that "at the time these bonds were issued, the law of North Carolina, as construed by the courts of the State, was that the copy of the act, attested according to law by the presiding officers of the two houses of the legislature, and filed in the office of the secretary of state, is conclusive proof of the enactment and contents of the statutes of the State, and that such attested copy cannot be contradicted by the legislative journals or in any other way," whereas there was no decision of the said supreme court of North Carolina in force when said bonds were issued, which was inconsistent with the subsequent ruling of the said court, Union Bank of Richmond *vs.* Commissioners of Oxford, 119 N. C., 214, that statutes providing for the creation of a debt by a municipal corporation came within the mandatory provision of section 14, art. 2, of the constitution, and constitute one of the two exceptions to the general rule created by art. 2, sections 14 and 16.

Tenth. Because the court erred, in view of all the admitted or undisputed facts, appearing from the pleadings and proofs offered, in holding that the bonds in controversy and described in the pleadings were valid obligations of Wilkes county.

Wherefore the said defendants, appellants, The Board of Commissioners of Wilkes County and John H. Johnson, treasurer of Wilkes county, pray that the said decree be reversed, and that the said court may be directed to enter a decree in accordance with the prayer of the bill.

A. C AVERY,
FINLEY AND GREEN,
T. J. DULA,
Solicitors for Defendants, Appellants.

Appeal Bond and Approval.

Know all men by these presents that we, the Board of Commissioners of Wilkes County, and John H. Johnson, sheriff and *ex officio* treasurer, as principals, and R. A. Spainhour and A. M.
126 Church, as sureties, are held and firmly bound unto W. N. Coler and Company, appellees in an appeal to the circuit court of the United States for the fourth circuit, entitled The Board of Commissioners of Wilkes County, and John H. Johnson, sheriff and *ex officio* treasurer, appellants, against W. N. Coler and Company, appellees, in the just and full sum of five hundred dollars ($500), to be paid to the said W. N. Coler and Company, their attorneys, executors, administrators and assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seal, and dated this 22nd day of April, A. D., 1899.

Whereas, lately, at a circuit court of the United States for the western district of North Carolina, at Greensboro, in a suit depending in said court between W. N. Coler and Company, complainants, against the Board of Commissioners of Wilkes County, and John H. Johnson, sheriff and *ex officio* treasurer of Wilkes county, and another, defendants, a decree was rendered against the said, The Board of Commissioners of Wilkes County, and John H. Johnson, *ex officio* treasurer, defendants, and in favor of the said W. N. Coler and Company, complainants, and the said Board of Commissioners of Wilkes County, and John H. Johnson, sheriff and *ex officio* treasurer of Wilkes county, having obtained an appeal, and filed thereof in the clerk's office of the said circuit court, to reverse the decree in the aforesaid suit, a citation directed to the said W. N. Coler and Company, citing and admonishing them to be and appear at a United States circuit court of appeals for the fourth circuit, to be holden at Richmond, Virginia, on the first Tuesday in May, A. D., 1899, being the 2nd day of May, 1899.

Now, the condition of the above obligation is such that, if the said, The Board of Commissioners of Wilkes County, and John H. Johnson, sheriff and *ex officio* treasurer, shall prosecute said appeal with effect, and answer all damages and costs if they fail to make their plea and defense good, then the above obligation to be void; otherwise to remain in full force and virtue.

THE BOARD OF COMMISSIONERS
OF WILKES COUNTY,
By J. T. PEDEN, *Chairman.* [SEAL.]
L. C. JENNINGS. [SEAL.]
J. H. JOHNSON,
Sheriff and ex Officio Sreasurer. [SEAL.]
A. M. CHURCH. [SEAL.]
R. A. SPAINHOUR. [SEAL.]

127 NORTH CAROLINA, }
Wilkes County. }

Personally appeared before me this day R. A. Spainhour and A. M. Chruch, residents and freeholders of said county and State, who made oath that they — each worth the sum of $500 over and above all their indebtedness and homestead and personal property exemptions allowed by law. This the 22nd day of April, A. D., 1899.

L. BUMGAMER,
Clerk Superior Court.

Approved:
THOMAS R. PURNELL, *Judge.*

29th day of April, 1899.

Citation on Appeal.

United States Circuit Court of Appeals for the Fourth Circuit.

UNITED STATES OF AMERICA, }
Fourth Judicial Circuit, } *ss:*

To W. N. Coler and Company Greeting:

You are hereby cited and admonished to be, and, appear at a session of the United States circuit court of appeals, to be holden at the city of Richmond, in said circuit, on the 10th day of May, A. D. 1899, pursuant to an appeal from a decree of the circuit court of the United States for the western district of North Carolina, fourth circuit, rendered at Greensboro on the 13th day of April, A. D. 1899, in your favor in a cause depending in said court wherein W. N. Coler and Company are complainants and The Board of Commissioners of Wilkes County and John H. Johnson, sheriff and *ex officio* treasurer, and another, are defendants, named in the original bill, to show cause, if any there be, why the decree rendered against the said defendants in said cause above named (appellants here) should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of our Supreme Court, this the — day of April, in the year of our Lord one thousand eight hundred and ninety-nine.

THOS. R. PURNELL,
U. S. Judge, &c.

128 I accept service of the forgoing citation on appeal having agreed to allow further time till July 1st, 1899, to perfect a case on appeal. This the 14th day of April, 1899.

CHAS. PRICE,
Solicitor for Appellees.

Filed in this office May, 6th 1899.

SAM. L. TROGDON, *Clerk.*

Order to Transmit Record.

UNITED STATES OF AMERICA, }
Western District of No. Ca. }

In the Circuit Court, Fourth Circuit, at Greensboro.

And thereupon, it is ordered by the court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereto relating, be transmitted to the said circuit court of appeals for the fourth circuit; and the same is transmitted accordingly.

Teste:

SAM'L L. TROGDON, *Clerk.*

Clerk's Certificate.

I, S. L. Trogdon, clerk of the circuit court of the United States for the western district of North Carolina, at Greensboro, in said district, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of W. N. Coler and others, bankers, under the name and style of W. N. Coler & Co. *vs.* The Board of Commissioners of Wilkes County and others, as fully as appears from the original papers and records in this office.

Seal of the Court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at office in city of Greensboro, in said district, on this the 29th day of June, A. D. 1899.

SAM'L L. TROGDON,
Clerk of the said Circuit Court.

129 *Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit.*

BOARD OF COMMISSIONERS OF Wilkes County *et al.*, Appellants,
vs.
W. N. COLER & COMPANY, Appellees.

No. 319. Appeal from the Circuit Court of the United States for the Western District of North Carolina, Greensboro.

June 30, 1899. Transcript of record filed, and cause docketed.
Same day. Appearance of A. C. Avery for the appellants, order filed.
July 3, 1899. Appearance of Charles Price for the appellees, order filed.
July 19, 1899. Twenty copies of printed record filed.

Notice of Appellants to be Allowed to File Affidavits.

Filed Oct. 16, 1899.

130 UNITED STATES OF AMERICA, }
Western District of North Carolina. }

Circuit Court of Appeals, Fourth Circuit.

COLER AND COMPANY }
versus }
THE BOARD OF COMMISSIONERS OF WILKES COUNTY ET AL. }

Notice.

To Honorable Charles Price, counsel for Coler & Company, appellees:

You will take notice that the appellants will move before the circuit court of appeals of the fourth district at Richmond on the 16th day of November, 1899, to be allowed to file with the record, and to constitute a part of the same, the affidavits of Thomas S. Kenan, Joseph L. Seawell and A. C. Avery, copies of which affidavits are attached to this notice.

A. C. AVERY,
Attorney for The Board of Commissioners of Wilkes County and C. C. Wright, Appellants.

I acknowledge service of the foregoing notice together with copies of the affidavits of T. S. Kenan, J. L. Seawell and A. C. Avery, attached thereto by delivery of copies of said notice and affidavits to me this the 14th day of October A. D. 1899, original being shown to me.

CHAS. PRICE,
Solicitor for Coler and Company, Appellees.

131 *Affidavits of Thomas S. Kenan, Joseph L. Seawell, and A. C. Avery.*

Filed Oct. 16, 1899.

132 UNITED STATES OF AMERICA:

Circuit Court of Appeals, Fourth Circuit.

COLER AND COMPANY
versus
THE BOARD OF COMMISSIONERS OF WILKES COUNTY ET AL.

Affidavits Offered by Appellants.

133 UNITED STATES OF AMERICA:

Circuit Court of Appeals, Fourth Circuit.

COLER AND COMPANY
versus
THE BOARD OF COMMISSIONERS OF WILKES COUNTY ET AL.

RALEIGH, NORTH CAROLINA.

Thomas S. Kenan, being duly sworn, on this the 12th day of October, 1899, deposes and says:

1. That he is now, and was, when the case of Commissioners of Wilkes *et al. v.* Clarence Call *et al.* was carried by writ of error to the Supreme Court of the United States from the supreme court of North Carolina, clerk of the last-named court, and caused the making up of the transcript of the record sent up in obedience to the writ of error.

2. That under the rule of the supreme court of North Carolina, the justice who writes the opinion delivers the manuscript to the clerk, who is required to have five typewritten copies made, and to furnish one to each of the justices, and that the rule was followed in this case.

3. That it is the practice for the justice who writes the opinion to make such corrections in the typewritten copy as he may deem requisite, before the same is filed as the decision of the court, and that Justice Douglas did make corrections in the typewritten copy furnished him in this case, and among them is one on page 20 of the opinion, in which the following words are stricken out with a pencil, but leaving the same still legible, to wit: "That the railroad does not touch the county of Wilkes and;" that copies of the same were sent to the official State reporter and to the West Publishing Company and to the Supreme Court of the United
134 States, and that any mistake which may have occurred in verifying any one of said copies with the original is due to an oversight of the affiant or his deputy in correcting all of the four copies so as to make them conform to the one furnished Justice

Douglas and filed as the original opinion; and that the affiant does not remember whether the verification in this particular case was made by himself or his deputy.

THOS. S. KENAN.

Sworn to and subscribed before me, day and year first above written. Witness my hand and official seal.

R. C. LAWRENCE,
Notary Public.

[SEAL.]

Joseph L. Seawell, being duly sworn, deposes and says: That he is employed as deputy clerk and typewriter by the said Thomas S. Kenan, who makes the foregoing affidavit; that he has read the same and that the facts therein stated are true.

JOS. L. SEAWELL.

Sworn to and subscribed before me, day and year first above written. Witness my hand and official seal.

R. C. LAWRENCE,
Notary Public.

[SEAL.]

135 UNITED STATES OF AMERICA,
Western District of North Carolina.

Circuit Court of Appeals, Fourth Circuit.

COLER AND COMPANY
versus
THE BOARD OF COMMISSIONERS OF WILKES COUNTY ET AL.

A. C. Avery being duly sworn, deposes and says:

1. That he was attorney for the plaintiffs in the action entitled Board of Commissioners of Wilkes County *et al. v.* Clarence Call *et al.* in the superior court of Wilkes county, North Carolina, where it was brought, in the supreme court of North Carolina, and in the Supreme Court of the United States, where the cause was taken up by writ of error.

2. That in making up his brief for the Supreme Court of the United States, the affiant cited the opinion as published in the South Eastern Reporter, volume 31, page 481, and it having never occurred to affiant that any mistake had been made in the transcript sent up, the affiant read the other portions of the record sent up, but did not read the opinion of Justice Douglas as printed in the record, and was astonished when he *made* the attack made upon him in the argument of this cause in the circuit court at Greensboro.

3. That, though unable to communicate with Justice Douglas or the clerk of the supreme court of North Carolina in time to offer their affidavits on the hearing in said circuit court, the affiant, being familiar with the rule as to copying and correcting opinions of the justices of the supreme court of North Carolina, suggested as
136 a probable explanation of the cause of the error what is now shown to have been the truth by the affidavits of the clerk and his deputy.

4. That the affiant would have asked for a statement on oath from Justice Douglas, but for the fact that he is not on duty or in the State of North Carolina, but in a sanatarium, or under treatment in the city of Philadelphia, Pa.

A. C. AVERY.

Sworn to and subscribed before me this the 12th day of October, 1899, as witness my hand and seal of office.

[SEAL.] R. C. LAWRENCE,
Notary Public.

137 *Certified Questions or Propositions of Law Certified to the Supreme Court of the United States.*

Filed Nov. 17, 1899.

Upon the hearing on the circuit, the decree, as above set out, was entered in favor of the complainants, whereupon, the suit was taken by appeal to this, the circuit court of appeals for the fourth circuit, before the undersigned, and said court desiring for its proper decision the instruction of the Supreme Court of the United States concerning certain questions or propositions of law arising in said suit:

Now therefore, we the undersigned, do hereby certify said questions or propositions of law to the Supreme Court of the United States for instruction as aforesaid:

First. Whether, upon the averments of the bill of complaint, answers, replications, orders, exhibits, and other evidence, and matters and things recited herein, the circuit court of the United States, was bound in passing upon this case by the decisions of the supreme court of North Carolina in the following cases:

Commissioners of Wilkes County *vs.* Clarence Call *et al.*, 123 North Carolina Report 308;
Bank *vs.* Commissioners, 119 N. C. Rep. 214;
Commissioners *vs.* Snuggs, 121 N. C. Rep. 394;
Radman *vs.* Washington, 122 N. C. Rep. 39;
Commissioners *vs.* Payne, 123 N. C. Rep. 432;

considering in connection with prior decisions of said court, and the following provisions of the constitution of said State:

Article 2, sections 14 and 16, and article 5, section- 1, 4, 6 and 7, and article 7, section 7.

Second. Whether, if the bonds and coupons in question, were issued, put in circulation and came to the hands of com-
138 plainants, appellees, in due course of trade, for valuable consideration, and without notice, and if there were at that time no decision of the supreme court of North Carolina adverse to these bonds or identical bonds, issued under similar statutes, the bonds held by complainants are valid bonds.

Third. Whether there was any decision adverse to the validity of these bonds or identical bonds or any construction of the consti-

tution or law of North Carolina which affected the question of their validity when they came in due course of trade and for valuable consideration and without notice, other than such notice as the parties are assumed to have of existing provisions in the constitution and statutes of the State, of their invalidity.]

As witness our hands this 17th day of November, A. D. 1899.

CHARLES H. SIMONTON,
Circuit Judge Presiding, Fourth Circuit.
JOHN PAUL,
District Judge, Western District of Virginia.
WM. H. BRAWLEY,
District Judge, District of South Carolina.

(MEM.—The record of the pleadings, decree &c. incorporated into said certificate is omitted from this record by agreement of counsel, which is hereafter inserted.)

139 Dec. 12, 1899.—Certified copy of the certificate transmitted to the Supreme Court of the United States.

Mandate of the Supreme Court of the United States.

Filed May 13, 1901.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the fourth circuit, Greeting:

[Seal of the Supreme Court.]

Whereas, lately in the United States circuit court of appeals for the fourth circuit, in a cause between The Board of Commissioners of Wilkes County *et al.*, appellants, and W. N. Coler & Company, appellees, wherein certain questions arose which were certified under the seal of the said circuit court of appeals to the Supreme Court of the United States for its opinion, as by the inspection of the certificate of the judges of the said United States circuit court of appeals, which was brought into the Supreme Court of the United States agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred, the said cause came on to be heard before the said Supreme Court, on the said certificate,
140 and was argued by counsel.

On consideration whereof, it is the opinion of this court that the circuit court of the United States should have regarded the decisions of the supreme court of North Carolina in Bank *v.* Commissioners; Commissioners *v.* Snuggs; Rodman *v.* Washington; Commissioners of Wilkes County *v.* Call; and Commissioners *v.* Payne, referred to in the first certified question, as controlling upon the inquiry whether the legislative enactments of 1868, 1879, and 1881

were passed in such manner as to become, under the Constitution, laws of the State.

2. That the rights of the parties in this case are determinable by the law of the State as it was declared by the State court to be at the time the bonds here involved were made in the name of the county and put upon the market.

Whereupon, it is now here ordered by this court that it be so certified to the said United States circuit court of appeals.

MARCH 18, 1901.

You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion of this court as according to right and justice, and the laws of the United States, ought to be had, the said certificate notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 19th day of April, in the year of our Lord one thousand nine hundred and one.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

141 May 15, 1901 (May term 1901), cause came on to be heard and was argued by counsel and submitted.

Feb. 4, 1902 (February term 1902), the court announced and filed its opinion, which is as follows, to wit:

Opinion.

Filed Feb. 4, 1902.

142 United States Circuit Court of Appeals, Fourth Circuit.

THE BOARD OF COMMISSIONERS OF Wilkes County *et al.*, Appellants, *vs.* W. N. COLER & COMPANY, Appellees.	No. 319. Appeal from the Circuit Court of the United States for the Western District of North Carolina, at Greensboro.

(Argued May 15, 1901; decided Feb. 4, 1902.)

Before Goff, circuit judge, Morris and Boyd, district judges.

A. C. Avery and James E. Shepherd for the appellants, and Charles Price (John F. Dillon, Harry Hubbard and John M. Dillon on brief) for the appellees.

MORRIS, *District Judge:*

This is a suit to determine the validity of certain bonds issued by Wilkes county, North Carolina, in aid of the construction of the Second division of the railroad constructed by the Northwestern North Carolina Railroad Company, incorporated in 1868; the Second division being from the towns of Winston and Salem, up

the valley of the Yadkin, by way of Jonesville and Wilkesboro, in the county of Wilkes, to Patterson's factory, in the county of Caldwell.

143 After hearing argument in this appeal at the November term, 1899, this court certified to the Supreme Court of the United States three questions: first, whether this court was controlled in dealing with the case by certain decisions of the supreme court of North Carolina in connection with article 2, sections 14 and 16, and article 5, sections 1, 4, 6 and 7, and article 7, section 7, of the constitution of North Carolina, adopted April 24, 1868. Second, whether, if there was no decision of the supreme court of North Carolina adverse to the validity of the bonds at the time when the appellees acquired them for a valuable consideration, without notice, they were valid in the hands of the appellees. Third, whether when the appellees acquired the bonds any decision then announced by the supreme court of North Carolina was adverse to the validity of the bonds which affected them in the hands of the appellees.

The bonds were dated October 21, 1889, and each one contained the following recital: "This bond is one of a series of one hundred issued by authority of an act of the General Assembly of North Carolina ratified on the 20th day of February, A. D. 1879, entitled 'An act to amend the charter of the Northwestern North Carolina railroad for the construction of a Second division from the towns of Winston and Salem, in Forsyth county, up the Yadkin valley, by Wilkesboro, to Patterson's factory, Caldwell county,' and authorized by a vote of the majority of the qualified voters of Wilkes county, by an election regularly held for that purpose, on the 6th day of November, A. D. 1889, and by an order of the board of commissioners of Wilkes county, made on the first day of April, A. D. 1889. This series of bonds is issued to pay the subscription of one hundred thousand dollars, made to the capital stock of the Northwestern North Carolina Railroad Company by said county of Wilkes."

Article 2, section 14 of the constitution of North Carolina, adopted April 24, 1868, provided that no law should be passed authorizing a county to raise money on its credit, or impose a tax, unless the bill for the purpose was read three several times in each house of the General Assembly and passed three several readings on different days in each house, and unless the yeas and nays on the second and third reading of the bill were entered on the journals.

144 The supreme court of North Carolina in Commissioners of Wilkes County *vs.* Call, 123 N. C., 308; Bank *vs.* Commissioners, 119 N. C., 214; Commissioners *vs.* Snuggs, 121 N. C., 374; Rodman *vs.* Washington, 122 N. C., 39; Commissioners *vs.* Payne, 123 N. C., 432, all cases involving the validity of county bonds, has held that the provisions of the constitution of North Carolina requiring the entry of the yeas and nays on the journals was imperative, and the failure of such entry was absolutely fatal to the validity of the legislation, so far as it undertook to authorize the county to issue bonds in aid of a railroad.

In Commissioners of Wilkes County *vs.* Call (1898) the validity of the bonds of the issue now in suit was called in question, and the supreme court of North Carolina declared that the act of February 20, 1879, under which these bonds are recited to have been issued, was never legally passed so as to become a law giving authority to issue the bonds, for the reason that the yeas and nays were not entered upon the journals. To the questions certified by this court the Supreme Court of the United States gave the most thorough consideration and held, Mr. Justice Harlan speaking for the court (Wilkes County *vs.* Coler, 180 U. S., 506), that the circuit court was bound by the decisions of the supreme court of North Carolina construing their own State constitution and holding that the legislative enactments of 1868, 1879, and 1881, were not validly enacted so as to give Wilkes county power to issue these bonds. But the Supreme Court of the United States further ruled that notwithstanding the invalidity of the act of February 20, 1879, the *bona fide* holders of the bonds might look to any valid legislation giving power to issue them, and that whether or *or* not there was such power was to be determined by the law of North Carolina, as declared by the supreme court at the time the bonds were put upon the market.

Mr. Justice Harlan, speaking for the court, said: "But the Belo case involved other considerations. Forsyth county—whose liability on the bonds in suit in that case was directly involved—made the point that it had no authority to issue such bonds. The court, however, held that such authority was conferred by the convention ordinance of March 9, 1868, and the subscription and bonds made in the name of that county to the Northwestern North Caro-
145 lina Railroad Company were upheld as valid under that ordinance, which was recognized as part of the law of the State and as conferring authority on the county of Forsyth, to do what it did. It results that when the bonds here in question were issued in 1889, it was the law of North Carolina that the ordinance of 1868, constituting the charter of the Northwestern North Carolina Railroad Company, was not superseded by the constitution of 1868, but was in force, and, therefore, gave power to the counties embraced by its provisions to take stock in that company and pay for it in county bonds just as Forsyth county had done."

Mr. Justice Harlan then calls attention (page 531) to the rule that as in 1877 in the Belo case the supreme court of North Carolina had recognized the power of the counties embraced within the provisions of the convention ordinance of 1868 to issue bonds to pay for stock in this same railroad when the power was exercised by a county under the restrictions imposed by the constitution of 1868, that is to say, "not unless by a vote of a majority of the qualified voters therein" that no subsequent decision of the supreme court of North Carolina made after county bonds had been put upon the market could alter vested rights by holding that the constitution of 1868 abrogated the power given by the convention ordinance and that no subscription in aid of a railroad could be made except by virtue of a new statute passed in conformity to the requirements of section 14 of article 2, and thus invalidate bonds issued before the rendering of

such a decision. The Supreme Court of the United States, while recognizing that the Belo and Hill cases had held that the convention ordinance of 1868 gave power to the counties embraced within its terms to issue bonds such as those now in suit, declined to consider under the questions certified by this court whether Wilkes county was embraced within the general powers of that ordinance, and suggested the following as some of the various questions which might arise in considering whether Wilkes county had the power under that ordinance, unassisted by any of the subsequent enactments, to issue the bonds sued on in the present case, viz.:

"Did the general power given by that ordinance to the North-
western North Carolina Railroad Company to construct a
146 railroad from its eastern terminus 'running by way of Salem
and Winston, in Forsyth county, to some points in the north-
western boundary line of the State to be hereafter determined'
invest Wilkes county with authority to subscribe to the stock of the company and to issue bonds in payment of such subscription? Was Wilkes county in the same category with Forsyth county? Was the route of the road northwest of Salem and Winston to some point in the northwestern boundary line of the State to be determined by the legislature or by the company? If by the legislature, was that route ever determined otherwise than by the act of 1879 which has been adjudged never to have become a law of the State? Did Wilkes county have authority, under the ordinance of 1868 alone, to aid by a subscription of stock and bonds the construction of the Second division of the road referred to in the act of 1879, extending from the towns of Winston and Salem up the valley of the Yadkin by way of Jonesville and Wilkesboro, in the county of Wilkes, to Patterson's factory, in the county of Caldwell?" The Supreme Court said: "These are matters about which we do not feel disposed to express an opinion under the very general and indefinite questions certified from the circuit court of appeals. Nor do we deem it proper to express any opinion as to the scope and the effect upon the rights of the parties of sections 1996, 1997, 1998, and 1999 of the Code of North Carolina."

The recitals of the bonds in suit are as follows:

1. That the bond is issued by authority of an act of the General Assembly of North Carolina ratified the 20th day of February, A. D. 1879. This act being an invalid enactment and not a law, so far as it undertakes to give power to issue bonds, this recital does not preclude enquiry as to whether or not there was such a law and the existence of legislative authority.

Northern Bank *vs.* Porter Township, 110 U. S., 608.

But the recital of an invalid act does *does* not preclude enquiry as to whether there was in existence any other valid legislative authority under which power to issue the bond, could be upheld.

Wilkes County *vs.* Coler, 180 U. S., 506–524.
Anderson County *vs.* Beal, 113 U. S., 227.
Commissioners *vs.* January, 94 U. S., 202.
Evansville *vs.* Dennett, 161 U. S., 434, 443–444.
Knox County *vs.* Ninth National Bank, 147 U. S., 91.

147 2. The second clause of the recital is to the effect that the bond is authorized by a vote of the majority of the qualified voters of Wilkes county by an election regularly held for that purpose on the 6th day of November, A. D. 1889, and by an order of the board of commissioners of Wilkes county, made on the first day of April, A. D. 1899. This is a recital of facts which it was for the board of commissioners of Wilkes county to ascertain and decide, and which, therefore, the county is estopped from denying as against a *bona fide* holder.

Anderson County *vs.* Beal, 113 U. S., 227–229.
Gunnison County *vs.* Rollins, 173 U. S., 255.

3. The bond further recites, that "This series of bonds is issued to pay the subscription of $100,000 made to the capital stock of the Northwestern North Carolina Railroad Company by said county of Wilkes."

This recital is in the same way conclusive of the facts therein stated.

The question now to be passed upon, therefore, is whether, independent of the invalid legislative enactments attempted to be passed subsequent to the convention ordinance of March 9, 1868, Wilkes county had the power under that ordinance to submit the stock subscription to the vote of the qualified voters, and upon authorization by a majority of the votes to issue the bonds and levy taxes to pay the interest and principal. If Wilkes county was in the same category with Forsyth county, the supreme court of North Carolina adjudged in the case of Belo *vs.* Commissioners, 76 N. C., 489 (1877), that the power was conferred by the ordinance of the convention, and this ruling remained undisturbed by any subsequent adjudication of the supreme court of North Carolina, and until after these bonds were issued.

The power thus held to be sufficient to authorize Forsyth county to subscribe to the stock of this railroad and issue bonds in payment is to be found in the following sections of the ordinance to incorporate the Northwestern North Carolina Railroad Company, ratified March 9, 1868.

148 "SECTION 1. That for the purpose of constructing a railroad of one or more tracks from some point on the North Carolina railroad between the town of Greensboro, in Guilford county, and the town of Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county, to some point in the northwestern boundary line of the State, to be hereafter determined, a company is hereby incorporated under the name and style of the Northwestern North Carolina Railroad Company, &c., &c."

"SECTION 2. Be it further enacted That the capital stock of said company may be created by subscriptions on the part of individuals, corporations and counties in shares of one hundred dollars."

SECTION 5 provides that the president and directors shall proceed to locate the eastern terminus of the road and proceed at once to construct said road in five-mile sections to the towns of Winston and

Salem, in Forsyth county, which portion of the railroad when completed "shall constitute its First division."

SECTIONS 8 and 9 provide that the State should loan its bonds to the railroad company as each five miles is graded and ready for its superstructure to the amount of $10,000 per mile upon the security of a first mortgage of the entire road and its property.

SECTION 12 is as follows:

"Be it further ordained That the stockholders of said company may pay the stock subscribed by them either in money, labor or materials for constructing said road as the board of directors may determine, and that all counties or towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company, for the government of such towns and counties as are now allowed to subscribe to the capital stock of said company."

"SECTION 13. Be it further enacted That the company shall have the power to construct branches of said road, one of which
149 shall run from the towns of Winston and Salem, by way of Mount Airy, in Surry county, to the line of the State of Virginia."

Section 33 of the charter of the North Carolina and Atlantic Railroad Company passed in 1852, chapter 136, is as follows:

"SECTION 33. Be it further enacted That it shall be lawful for any incorporated town or county near or through which said railroad may pass to subscribe for such an amount of stock in said company as they shall be authorized to do by the inhabitants of said town or the citizens of said county in manner and form as hereafter provided."

SECTIONS 34, 35, 36 and 37 provide the manner in which the vote of the qualified voters of the counties shall be taken and, if a majority of the qualified vote-s voting upon the question are in favor of the subscription, provide how the subscription shall be made and that the county shall negotiate a loan or loans and shall levy taxes to pay the principal and interest.

It will be seen by reading the sections of the charter of the North Carolina and Atlantic railroad into the charter of the Northwestern North Carolina railroad, as required by its section 12, that every county near or through which the railroad may pass is authorized to subscribe for its stock to an amount authorized by a majority of the qualified voters of the county and to issue bonds in payment and to levy taxes to pay the principal and interest. The first question, therefore, now is, was the railroad which was constructed into Wilkes county by the Northwestern North Carolina Railroad Company a part of the railroad authorized to be built by its charter? If it was, then it would seem that the powers conferred by the charter operated to validate the action of Wilkes county just as the same powers in the same charter were held by the supreme court of North Carolina in Belo *v.* Commissioners, to have done in the case of Forsyth county.

The convention ordinance authorizes counties to subscribe to the

stock of the railroad company and it provides that all counties subscribing shall do so in the manner and under the same rules, regulations and restrictions set forth in the charter of 1852, chapter 136.

The only restriction in that charter which is drawn in question is the provision that the subscription shall be by counties near or through which the railroad may pass. The railroad, in aid of which the bonds in suit were issued, does pass through Wilkes county.

It appears to us that it is the same railroad authorized by the convention ordinance. That ordinance authorizes a railroad running by way of Salem and Winston, in Forsyth county, to some point in the northwestern boundary line of the State to be thereafter determined, and contemplated and provided for its being built by divisions, and enacted that the portion to Salem and Winston should constitute its First division. The piece of railroad for which the bonds in suit were issued does run from Salem and Winston in the general direction of the northwestern boundary line of the State, and, indeed, it seems evident that such a railroad to some point in the northwestern boundary line of the State must pass near or through Wilkes county. The act of February 20, 1879, which is recited in the bonds as the authority for issuing them, definitely located this road running into Wilkes county. It does it by enacting that section 13 of the convention ordinance shall be amended by adding certain words which make it read, when so amended as follows:

SEC. 13. Be it further ordained That the company shall have power to construct branches of said road, one of which shall run from the towns of Winston and Salem by way of Mount Airy, in Surry county, to the line of the State of Virginia (amendment)," and one of which shall be constructed from the town of Winston and Salem, up the valley of the Yadkin by way of Jonesville and Wilkesboro, in the county of Wilkes, to Patterson's factory, in the county of Caldwell, which branch shall be known as Second division.

Section 2 of the act of February 20, 1879, provides for convict labor being furnished for the purpose of constructing this Second division; and section 4 provides for bond subscriptions by any county in the State. This act was invalid so far as it attempted to give power to the counties to create a debt, because it was not passed as laws for that purpose are required by the constitution of North Caro-
151 lina to be passed, but that invalidity does not affect the sections of the law which deal with other matters.

Rodman *vs.* Washington, 122 N. C., 39–42.
Russell *vs.* Ayres, 120 N. C., 180–189.
Gamble *vs.* McCrady, 75 N. C., 509.
Bank *vs.* Commissioners, 119 N. C., 214.

So far as now appears, the amendment locating the road into Wilkes county was validly passed and became a valid law of North Carolina.

If section 13 had been originally enacted as it now reads as amended, it would seem clear that as when built this piece of road

was declared to be the Second division of said road, and as power was given to all counties "near or through which said railroad may pass" to subscribe for stock, that Wilkes county would be in the same category with Forsyth county, which is mentioned in the section locating the First division. Wilkes would be one of the counties through which the Second division of the road was authorized to be constructed, just as Forsyth was a county into which the First division of the road was to be built.

Has the supreme court of North Carolina ever interpreted this amendment and declared its meaning? We do not find that it has. In Commissioners *vs.* Call, the majority opinion does not place the decision upon the contention that Wilkes county is not in the same category with Forsyth county, but upon a want of power affecting both alike and upon the fact that an invalid enactment is recited on the face of the Wilkes County bonds as authority to issue them.

The original charter ordinance of 1868, having given authority to construct a railroad by way of Salem and Winston, in Forsyth county, to some point on the northwestern boundary line of the State, and to construct branches, and the legislature having afterwards validly enacted that one of these branches running towards the northwestern boundary line of the State, to be called the Second division, should be constru-ed by way of Wilkes county, there would seem no sound reason for construing the legislation so as to deny to Wilkes county that power to issue bonds which the supreme court of North Carolina had in 1877 held that Forsyth county had.

It is urged in argument that the policy of North Carolina
152 was declared by the constitution of 1868 to be hostile to permitting counties to bond themselves in order to subscribe to railroads which passed near or through them.

We do not think this anywhere appears.

The constitution does not, as it might easily have done, if such had been the policy of its framers, declare that no county should have the power to create a debt for such a purpose; it merely provided that new laws for that purpose should be enacted with a special formality tending to insure their careful consideration by the legislature. The only inhibition which the constitution enacts against counties is by article VII, sec. 7, which is that no county shall loan its credit unless by a vote of the majority of the qualified voters, and the constitutional convention itself passed the charter of the Northwestern North Carolina railroad with the power to the counties near or through which it should pass to issue bonds for subscription to its stock, and the constitution did not inhibit the execution of any powers previously given to counties to make subscriptions to railroad stock and issue bonds therefor. 180 U. S. 531.

Nor does section 1996 of the Code of North Carolina prescribing that counties shall have power to subscribe to aid in the completion of railroads in which their citizens may have an interest, nor the many enactments of the State legislature conferring upon counties the power to aid railroads indicate such a policy, but rather a contrary one.

We think that Wilkes county when the bonds in suit were issued

was in the same category with Forsyth county and that the purchasers of the bonds had a right to rely and rest upon the decisions in the cases of Hill *vs.* Commissioners, 67 N. C. 367 (1870), and Belo *vs.* Commissioners, 76 N. C. 489 (1877), as to the power conferred by the ordinance of March 9, 1868, and that the different conclusion as to the power conferred by that ordinance arrived at and declared by a majority of the supreme court of North Carolina, long after the date of the issuing of the bonds in suit, cannot destroy the validity of the bonds in the hands of *bona fide* holders.

Loeb *vs.* Columbia Township, 179 U. S. 472–492.

It is, of course, with great reluctance that we feel constrained to differ from the conclusion arrived at by the supreme court of
153 North Carolina as announced in the majority opinion in Commissioners *vs.* Call (1898), and it may be that the difference would not have arisen had the contentions in support of the validity of the bonds been as fully presented in that case in behalf of holders as deeply interested in them as they have since been in the Supreme Court of the United States and in this court in the litigation over their validity.

Having reached the conclusions herein expressed, it does not appear necessary to consider the effect of sections 1996, 1997, 1998 and 1999 of the Code of North Carolina giving power to counties to aid in the completion *in* railroads in which the citizens of the county have an interest.

The majority of the judges sitting in this appeal are of opinion that the decree of the circuit court should be affirmed.

BOYD, district judge, concurring:

In concurring with Judge Morris in his opinion in this case, I desire to say: This cause was argued upon the whole record, it being on appeal from a decree entered in the circuit court for the western district of North Carolina at Greensboro, April 14th, 1899, by Judge Purnell, designated to preside in that district by the circuit judge. The rights of the parties are to be determined upon the whole record, including the answers by the Supreme Court to the certified questions. The decision is reported in 180 U. S., page 506. The answers to the questions certified are, in substance, as follows:

1. That the circuit court should have regarded the decisions set out in the questions as controlling upon the inquiry whether the legislative enactments of 1868, 1879 and 1881 were passed in such manner as to become, under the constitution, laws of the State.

2. That the rights of the parties in this case are determinable by the law of the State as it was declared by the State court to be at the time the bonds here involved were made in the name of the county and put upon the market.

The questions certified by this court to the Supreme Court involved the validity of an issue of bonds in the sum of one hundred thou-

sand dollars by the county of Wilkes, in the State of North
154 Carolina, in the year 1889, in payment of its subscription in this sum to the capital stock of the Northwestern North Carolina Railroad Company, a corporation constructing and owning a railroad running from Greensboro via Winston-Salem, in Forsyth county, to Wilkesboro, in Wilkes county.

The power relied on by the complainants in the bill for the issue of the bonds was the ordinance of 1868, the charter of the company, and an act of assembly of the 11th of August, 1868, the sections 1996, 1997, &c., of the Code of North Carolina, an act of assembly of 20th of February, 1879, and an act of March 2nd, 1881, all referred to in paragraph 21 of the bill, page 7, of the record, &c.

After the issue of these bonds, in due course of trade, there came into the hands of complainants fifty-five of the same of the denomination of one thousand dollars each.

The purchase of the same was for value, the highest market price, in good faith, and without notice, express or implied, that there was any suggestion of their being void, invalid, fraudulent or otherwise than legal bonds in their issue and sale.

It is alleged that the interest on these bonds was paid regularly for eight years by the county, and that such payment was enjoined by a judgment of the superior court of Wilkes county, affirmed by the supreme court, rendered in an action by the Board of Commissioners of the County *vs.* The Treasurer, one Call, who, as such, held in his hands a fund for that purpose.

It is alleged in the bill that this railroad runs over twenty miles in the county of Wilkes, and is the only railroad in that county.

It is contended upon the part of the appellants that the decision of the supreme court of North Carolina, in the action above set out should be followed by the circuit court. The Supreme Court, in answering the questions certified, disposed of that contention. Therefore, I will not discuss it further than I have already in the Stanly case, No. 290, at this term.

By reference to the decision of the Supreme Court, it is to be noted one thing decided was that the ordinance of 1868 was valid, and was in force after the constitution was adopted; and, further, that the supreme court of North Carolina had so held in the cases of
155 Hill *vs.* Coms. of Forsyth County, 67 N. C. R., 367 (June term, 1870), and in Belo *vs.* Coms. of Forsyth County, 76 N. C. R., 489 (Aug. term, 1877).

Further, it was held expressly that the Belo case decided the ordinance of 1868, March 9th, conferred the power upon Forsyth county to make the subscription made by the county, and that this was so independently of any other legislation.

As to Wilkes county, the court states the question to be as follows: "Whether Wilkes county was so situated with reference to the contemplated road that it could be said to have had the same authority as was given to Forsyth county."

Mr. Justice Harlan, delivering the opinion of the court says: "Was Wilkes county in the same category as Forsyth County?"

In short, if Wilkes county was in the same category with Forsyth

county, then it stands decided by the Supreme Court of the United States, that the ordinance of 1868, did give to Wilkes county the authority to issue the bonds in question, irrespective of the legislation of 1868, 1879, and 1881, so that the only question now is, whether Wilkes county was in the same category with Forsyth county. If so, the answer of the Supreme Court to the second question applies, which is that the rights of the parties in the Wilkes County case, this case, are determinable by the law of the State, as it was decided by the State court to be at the time when the Wilkes County bonds were put upon the market. It results, therefore, that if Wilkes county was in the same category with Forsyth county, the question is conclusively decided in favor of the validity of the bonds by the Supreme Court of the United States without anything more, and the circuit court of appeals should affirm the judgment of the circuit court in this case.

The supreme court of North Carolina, in Commissioners *vs.* Call, 123 N. C., 308 (p. 317), 1898, undertakes to distinguish the case of Belo *vs.* Commissioners, 76 N. C., 289, as follows: "We have not overlooked the fact that in Belo *vs.* Commissioners, 76 N. C., 489, this court strongly intimates that section 12 of the charter did confer the authority given in section 33 of the act of 1852." (Section 2 of the ordinance of the constitutional convention gave the
156 power, and section 12 prescribed the manner of its exercise.) "but it does so incidentally and with little discussion, because it was not denied in the pleadings. This was not the determining point in the case, which turned chiefly upon the recitals in the bonds and the ratifying act of 1868. This is clearly shown in the opinion itself, which devotes four pages to the discussion of equitable estoppel arising on the recitals, and about half a page to the possible binding effect of the ordinance, winding up with the significant sentence on page 497, that 'as the case is presented to us, that question does not arise and we do not decide it.' It evidently did not receive careful investigation, as it apparently did not arise in the pleadings. The court stated that the 'principle of equitable estoppel is a most important element in the transaction,' and that the recitals in the bonds (which were essentially different from those now before us) constituted an estoppel *in pais* upon the county of Forsyth."

There can be no estoppel by recitals in bonds in the absence of absolute legislative authority, power, to issue the same.

The whole discussion of the supreme court of North Carolina in Belo *vs.* Commissioners, which, as stated by the court in the case of Commissioners *vs.* Call, occupied four pages, proceeded upon the only possible ground—that there was legislative authority in the ordinance of 1868; but that perhaps that authority had not been strictly followed. The question which the court on page 497 says "does not arise" is this question stated in the very words of the opinion of the court, in Belo *vs.* Commissioners, to wit: "When the subscription was voted there is authority and reason for asserting that the justices could have been compelled, by process of law, to make the subscription, unless in defence they could have shown

that the election was not fairly conducted, but was influenced by the fraud of the railroad company (People *vs.* Supervisors, 27 Cal., 655). As the case is presented to us, that question does not arise and we do not decide it."

On the question of whether there was power to issue the bonds, the court said distinctly: "The county was clothed with the power to issue them, and it is admitted, that a majority vote sanctioned the subscription of stock, and the issue of the bonds."

Again, the court said: "It has been one purpose of
157 this opinion to show that the bonds were valid in the hands of *bona fide* holders without the aid of this healing act" (that is the act of August 11, 1868), the only other authority, being the said ordinance.

The case of Belo *vs.* Commissioners was decided in 1877, many years before the issue of these bonds, and, as before said, is the great leading case, upon this subject, in North Carolina.

This decision, and the impression it made upon the Supreme Court of the United States, as shown by the importance attached to it by Justice Harlan, has left but little for this court to decide.

As said by Bynum, justice, the author of the Belo decision—opinion—there was but one purpose he had in mind—to show the ordinance of the convention of 1868, the original charter of the company, gave the power to Forsyth county to issue the bonds, and was not, and did not, become ineffective upon the ratification of the constitution.

No recital in any bond ever did confer power to issue it. There must, in every case, first, be shown a power to issue, after which the recitals may be relied on by an innocent purchaser as assurance of the proper exercise of the power, and of the performance of the conditions precedent to the issue by the corporate authorities, putting the bond upon the market.

This rule, this principle, is axiomatic, universal, and has no exception.

Judge Morris has shown clearly that Wilkes county was in the same category with Forsyth county, the only question left open by the Supreme Court of the United States. The importance, however, of the interests involved demands that I should add something to what he has said upon this question. In the case of Bank *vs.* Coms., 119 N. C. R., 214, the act is expressly held valid as a charter, and for all purposes except as a taxing act. For that purpose it was void, because not passed as required by the constitution.

See section 1 of the act of 1879, directing that the road should run "up the valley of the Yadkin, by way of Jonesville and Wilkesboro, in the county of Wilkes," etc., is valid, and an amendment to the charter, the ordinance of 1868.

158 This puts Wilkes county in the same category as Forsyth county, in the sense suggested by Justice Harlan.

The route of the road was determined by the legislature; and by the company also.

Justice Harlan was not advertant to the fact that the act of 1879

was only adjudged void as a taxing act by the court, not for all purposes, but for this purpose only.

In the case of Bank *vs.* Commissioners, 119 N. C. R., 214, the act is expressly declared valid as a railroad charter, because the certification cannot be impeached by the journals; but void as a taxing act, because, for that purpose, under the constitution, it can be impeached by the same journals.

It is well settled in all courts that an act may be unconstitutional in part and constitutional in other respects. So section 1 of the act of 1879 is valid, because passed in all respects and certified as required by the constitution. See act of 1879, and especially section 5 &c., &c., where, upon its face, it is shown to have been read three times and ratified. The case of Bank *vs.* Commissioners, 119 N. C. R., 214, is decisive of this, being directly in point and, indeed, is the case out of which all this litigation has sprung. And, further, if the route was not a proper one, it was acquiesced in by the county when the company could have been forced, by mandamus, to have selected the proper one; or it could have been enjoined anyhow from constructing the road on the route determined upon if not the proper one.

Rodman *vs.* Washington, 122 N. C., 39, 42. Russell *vs.* Nyres, 120 N. C., 180–189. Gamble *vs.* McCrady, 75 N. C., 509. All cited by Judge Morris.

So it appears the route was determined by the legislature, by the company, and, at last, acquiesced in by the county.

I say by the company, because this legislation—that is to say, the ordinance—conferred the power upon the county of Forsyth and a privilege upon the company. Wilkes county is in the same category with Forsyth, so far as these powers are concerned, and it was one of the privileges of the company conferred also to determine the route of the road.

159 These powers are not only conferred upon the counties, but are privileges of the company, the Northwestern North Carolina Railroad Corporation. It follows, therefore, that Wilkes county was in "the same category" with Forsyth county.

The route of the road was determined by both the legislature and the corporation. This was one of the privileges conferred upon the company. And, besides, as before said, it is not for the county of Wilkes, which participated in the determination of the route, to be heard to say, in a suit by an innocent bondholder, years after it was determined, there was no power to do it.

In the case of The County of Scotland *vs.* Thomas, 94 U. S. R., on page 689, Justice Bradley says: "The specific question in the present case, therefore, is whether the authority given the counties and towns, in 1847, to subscribe to the capital stock of the Alexandria and Bloomfield R. R. Co. has become extinguished by the subsequent consolidation of that company with other companies, —spective of the constitutional provisions referred to."

Justice Bradley says, also, on page 688, after quoting the words of the constitution of Missouri, similar to the words of the North Caro-

lina constitution of 1868, that "This prohibition, it will be observed, is against the legislature's authorizing municipal subscriptions or aid to private corporations, it does not purport to take away any authority already granted."

On page 693, Justice Bradley goes on to say: "But the case has other aspects which it is necessary to take into consideration. * * * The project of the railroad promises a great public improvement, conducive to the interests of Alexandria and the counties through which it would pass. The power was sought at the hands of the legislature and was given." It was relied on by those who subscribed their private funds to the enterprise.

Speaking of this power, he says: "Why it should not still attach to this portion of the road as one of the rights and privileges belonging to it, into whose hands soever it comes, by consolidation or otherwise, it is difficult to see. * * * Subscription to the stock was not only a power of the county, but a privilege of the company."

I have not discussed the sections of the code in this con-
160 nection, because I do not consider it necessary, having already done so in the Stanly case at this term, before referred to.

The Supreme Court, in answer to the certified questions, has narrowed the issues between the parties to a small compass in this case.

It is clear that the two counties, Forsyth and Wilkes, were in the same category, as I say, in the sense expressed by Justice Harlan. Having determined that, our duty seems to me plain. The decree entered upon the circuit should, in my opinion, be affirmed.

GOFF, circuit judge, dissenting:

I dissent from the opinion of the court, as well as from the judgment entered in this case.

161 Feb. 8, 1902 (same term), the court made and entered the following decree, to wit:

Decree.

Filed Feb. 8, 1902.

United States Circuit Court of Appeals, Fourth Circuit.

BOARD OF COMMISSIONERS OF WILKES COUNTY ET AL., Appellants,
vs.
W. N. COLER & COMPANY, Appellees. } No. 319.

Appeal from the circuit court of the United States for the western district of North Carolina.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the western district of North Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and

decreed by this court, that the decree of the said circuit court, in this cause, be, and the same is hereby, affirmed with costs.

Feb. 8th, 1902. NATHAN GOFF.

162 *Stipulation of Counsel.*

Filed Feb. 19, 1902.

United States Circuit Court of Appeals, Fourth Circuit.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY ET AL., Appellants,
vs.
W. N. COLER & COMPANY, Appellees.

Whereas the counsel for appellants in the above-entitled cause propose to file a petition, on behalf of appellants therein, to the Supreme Court of the United States for a writ of certiorari, in order to have the decision of the circuit court of appeals for the fourth circuit reviewed, and,

Whereas, the record in said cause which was certified to said Supreme Court, apart from the three certified questions or propositions of law, signed by the judges of said circuit court (and which appear on page 48 of the original of said certificate or on page 42 of the certified record as printed), the said certified record is made up of extracts from the record sent up to said circuit court of appeals from the circuit court of the western district of North Carolina, at Greensboro.

Now therefore, the undersigned counsel respectively for the appellants and the appellees in said cause, in said circuit court of appeals for the fourth circuit, do hereby agree, that the said certified record, except the said certified questions, may be omitted from the record accompanying the petition and presented under the rule in such cases; and that if the Supreme Court under the rules shall require said portion of said record to be certified, it may be subsequently certified from the said circuit court of appeals and presented separately.

163 This agreement is based upon the fact that said certified record contains nothing that will not be found in the original record sent up from said circuit court.

This the 17 day of February, 1902.

A. C. AVERY,
Counsel for Appellants.
CHAS. PRICE,
Counsel for Appellees.

Feb. 19, 1902.—Mandate of this court is stayed pending petition for certiorari in the Supreme Court of the United States.

Clerk's Certificate.

I, Henry T. Meloney, clerk of the United States circuit court of appeals for the fourth circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein-entitled cause as the same remains upon the records and files of the said circuit court of appeals, excepting the pleadings, decree &c. accompanying the certified questions or propositions of law to the Supreme Court of the United States which are, omitted by agreement of counsel.

Seal United States Circuit Court of Appeals, Fourth Circuit.

In testimony whereof I hereto set my hand and affix the seal of the said United States circuit court of appeals for the fourth circuit, at Richmond this 19th day of February, A. D. 1902.

HENRY T. MELONEY,
Clerk U. S. Cir. Court of Appeals, 4th Ct.

164 UNITED STATES OF AMERICA, *ss:*

I, Henry T. Meloney, clerk of the United States circuit court of appeals for the fourth circuit, do make return of the annexed writ of certiorari issued out of the Supreme Court of the United States in the cause therein entitled on the 14th day of March, 1903, by annexing hereto a certified copy of the stipulation of the attorneys of record that the certified transcript of the record on file in the Supreme Court of the United States in the said cause shall be taken and considered a proper return to the said writ of certiorari.

In testimony whereof I hereunto set my hand and affix the seal of the said circuit court of appeals, at Richmond on this 30th day of March, A. D., 1903.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, 4th Circuit.

165 UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fourth Circuit.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY ET AL., Appellants,
vs.
W. N. COLER & COMPANY, Appellees. } No. 319.

We, A. C. Avery, solicitor for the appellants, and Charles Price, solicitor for the appellees, in the above-entitled cause, do hereby stipulate and agree that the certified transcript of the record, on file in the Supreme Court of the United States, of said cause shall be taken and considered a proper return to the writ of certiorari issued by said Supreme Court on the 14th day of March A. D. 1903, directed to the circuit court of appeals of the fourth circuit, and commanding said court to send without delay, to said Supreme Court the record and proceeding in said cause.

A. C. AVERY,
Counsel for Appellants.
CHARLES PRICE,
JOHN F. DILLON &
HENRY HUBBARD,
Of Counsell for Appellees (W. N. Coler & Co.).

UNITED STATES OF AMERICA:

I, Henry T. Meloney, clerk of the United States circuit court of appeals for the fourth circuit, do certify that the aforegoing
166 stipulation of counsel is a true copy of the original filed March 30, 1903, and now remaining among the records and proceedings in the therein-entitled cause.

In testimony whereof I hereto set my hand and affix the seal of the said circuit court of appeals, at Richmond, on this 30th day of March A. D. 1903.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, 4th Circuit.

167 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the fourth circuit, Greeting:

Being informed that there is now pending before you a suit in which The Board of Commissioners of Wilkes County and John H. Johnson, sheriff, and *ex officio* treasurer, are appellants, and W. N. Coler & Company, are appellees, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the western district of North Carolina, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme
168 Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 14th day of March, in the year of our Lord one thousand nine hundred and three.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

169 [Endorsed:] File No. 18,411. Supreme Court of the United States. No. 247, October term, 1902. The Board of Commissioners of Wilkes County *et al. vs.* W. N. Coler & Co. Writ of certiorari and return. The execution of the within writ of certiorari appears by certain schedules hereunto annexed. Henry T. Meloney, cl'k U. S. cir. court of appeals, 4th circuit. March 30, 1903. Filed Mar. 31, 1903.

27358

No. ~~—~~ 247

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1901.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY AND JOHN H. JOHNSTON, SHERIFF AND EX-OFFICIO CHAIRMAN OF WILKES COUNTY, PETITIONERS,

against

W. N. COLER & CO., RESPONDENTS.

To the Honorable Charles Price,
Counsel for Respondents:

You are hereby notified that on this 19th day of May, 1902, or if the Court should not then be in session, then on Monday, June 16, A. D. 1902, a motion will be made before the Honorable Supreme Court of the United States upon the petition, record and briefs, copies of which are attached as a part of this notice, for a writ of *certiorari* to be issued out of and under the seal of said Court, directed to the United States Court of Appeals for the Fourth Circuit, commanding said Court of Appeals to certify and send to said Supreme Court of the United States on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings of said Court of Appeals in this case entitled in said Court of Appeals "*The Board of Commissioners of Wilkes County et al., Appellants, against W. N. Coler & Co., Appellees, No. 319,*" to the end that

said cause may be reviewed, determined and adjudicated by the said Supreme Court of the United States, as provided in section 5 of the Act of Congress, entitled "An act to establish Circuit Courts of Appeal and to define and to regulate in certain cases the jurisdiction of the Circuit Courts of the United States, and for other purposes," approved March 3, 1891.

A. C. AVERY,
Counsel for Petitioners.

EDWARDS & BROUGHTON, PRINTERS AND BINDERS, RALEIGH.

27339

FILED
FEB 27 1902
JAMES H. MCKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 947

THE BOARD OF COMMISSIONERS OF WILKES COUNTY AND JOHN H. JOHNSON, SHERIFF AND EX OFFICIO TREASURER OF WILKES COUNTY, PETITIONERS,

vs.

W. N. COLER AND COMPANY, RESPONDENTS.

Petition for Writ of Certiorari Requiring the United States Circuit Court of Appeals for the Fourth Circuit to Certify to the Supreme Court, for Its Review and Determination, the Cause of The Board of Commissioners of Wilkes County and John H. Johnson, Sheriff and ex Officio Treasurer of Wilkes County, Appellants, vs. W. N. Coler and Company, Appellees.

A. C. AVERY,
Attorney and Counsel for Petitioners.

(18,411.)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1902

Supreme Court of the United States

OCTOBER TERM, 1901.

No. 558.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY AND JOHN H. JOHNSON, SHERIFF AND EX OFFICIO TREASURER OF WILKES COUNTY, PETITIONERS,

vs.

W. N. COLER AND COMPANY, RESPONDENTS.

Petition for Writ of Certiorari Requiring the Circuit Court of Appeals for the Fourth Circuit to Certify to the Supreme Court, for Its Review and Determination, the Cause of The Board of Commissioners of Wilkes County and John H. Johnson, Sheriff and ex Officio Treasurer of Wilkes County, Appellants, vs. W. N. Coler and Company, Appellees.

To the Honorable Supreme Court of the United States:

The petition of the Board of Commissioners of Wilkes County and John H. Johnson, sheriff and *ex officio* treasurer of Wilkes county, respectfully shows:

First. That your petitioners were the appellants and W. N. Coler and Company were appellees in a cause lately

pending in the circuit court of appeals for the fourth circuit, wherein an opinion was filed, Judges Morris and Boyd concurring therein and Judge Goff dissenting, on the fourth day of February, A. D. 1902, in said court, and a decree affirming the judgment of the circuit court for the western district of North Carolina was entered in accordance with said opinion (a certified copy of said record hereto attached), and that the said cause had been heard on certificate of the judges of said fourth circuit at the last term of the supreme court. (See opinion, Supreme Court Reporter, vol. 21, April 15th, 1901, p. —.)

Second. That the said cause involves a controversy as to the validity of certain county bonds of the denomination of one thousand dollars each, and amounting in the aggregate face value to one hundred thousand dollars, issued by Wilkes county, North Carolina, in the year 1889, and was begun by original bill filed by said W. N. Coler and Company in the circuit court for the western district of North Carolina, at Greensboro, and that the said circuit court, upon the hearing, entered a decree perpetually enjoining the said Board of Commissioners of Wilkes County from in any manner interfering with the performance of a decree declaring said bonds valid, and your petitioner, J. H. Johnson, a trustee holding thirteen thousand dollars and all of the money collected under the levy of a special tax, to meet the interest on said bonds thereafter coming into his hands, in trust for the sole purpose of paying off the interest due on said bonds to the appellees, W. N. Coler and Company, and other holders of said bonds (see decree signed by the judge in record), and that so soon as the mandate of said circuit court of appeals for the fourth circuit shall be sent down in pursuance of the decree entered in conformity to said opinion, the said circuit court can proceed to enforce its judgment which has been affirmed by said circuit court of appeals.

Third. As appears from said record (filed herewith), on the third day of December, 1897, before the filing of said bill by W. N. Coler and Company in said circuit court, an action had been instituted in the superior court of Wilkes county by the Board of Commissioners of Wilkes County and C. C. Wright, a tax-payer, against Clarence Call (then sheriff and *ex officio* treasurer, being the predecessor in office of your petitioner, Johnson), to which J. M. Turner and J. M. Wellborne became parties defendant and appealed from the judgment of Starbuck, judge, declaring said bonds invalid and restraining said treasurer from paying any part of the principal or interest purporting to be due on them, and that upon the hearing on said appeal the supreme court of North Carolina decided and adjudged (see Commissioners of Wilkes *vs.* Call, treasurer of Wilkes county, and J. M. Turner and J. M. Wellborne, bondholders, 123 N. C. R., 308, 327) that the said bonds were invalid and affirmed the said judgment of the said superior court restraining said treasurer from paying any part of the principal or the interest claimed to be due on them; whereupon the said J. M. Turner and J. M. Wellborne sued out a writ of error to the said supreme court of North Carolina from the Supreme Court of the United States on the 24th day of November, A. D. 1898, and, upon motion, the said judgment of the supreme court of North Carolina was affirmed and the said petition and writ were dismissed. (See J. M. Turner and J. M. Wellborne, plaintiffs in error, *vs.* The Board of Commissioners of Wilkes County, 173 U. S., 461.)

Fourth. That by reason of a conflict between the said decision of the circuit court of appeals for the fourth circuit and the decision of the supreme court of the State of North Carolina rendered in the case of The Board of Commissioners of Wilkes County and C. C. Wright, a tax-payer, *versus* Clarence Call, sheriff and *ex officio* treasurer of Wilkes county, and J. M. Turner and J. M. Wellborne, bondholders,

123 N. C. R., 308, 327, it has become necessary for the Supreme Court of the United States to determine and declare whether the said decision of the circuit court of appeals for the fourth circuit and the decree in accordance with said opinion should be affirmed or whether said circuit court of appeals erred in failing to follow the decision of the supreme court of North Carolina in declaring said bonds invalid under the construction given by said court to the constitution of said State and its laws pertaining to the validity of said bonds, and that the necessity for reviewing said conflicting decisions grows out of the fact (Forsythe *vs.* Hammond, 116 U. S., 506, 514, 515) that so soon as the said circuit court of appeals shall send down its mandate (which is withheld to await this application) the circuit court of the western district of North Carolina will, upon motion of the appellees, order your petitioner, Johnson, treasurer, to pay over to a receiver or to the holders of said bonds any money collected by him as a levy of special tax to pay the interest on said bonds, and will order your petitioner, The Board of Commissioners of Wilkes County, to levy a tax sufficient to pay any interest due on said bonds over and above such amount as may be in the hands of the receiver or of said treasurer and collected under a levy to meet interest on said bonds, whereas the supreme court of North Carolina having affirmed the judgment of Starbuck, judge of superior court of North Carolina (as appears in the attached record), enjoining and restraining the treasurer of Wilkes county from paying "any portion of the moneys belonging to the county of Wilkes and in his hands upon the principal or interest of said bonds," so that your petitioners would be subject to attachment for contempt by the said circuit court if they refuse to pay or permit the payment of interest on said bonds, and by the superior court of the State if any special tax fund already collected or hereafter collected by order of said board of commissioners as a special tax should be applied to the pay-

ment of interest on said bonds, but for the fact that the State courts will yield to the mandate of said circuit court, as issued under the supreme law of the land.

Fifth. That the opinion of the court, filed, as aforesaid, in the circuit court of appeals on the 4th day of February, A. D. 1902, was delivered by Judge Morris and Judge J. E. Boyd, of the western district of North Carolina, concurring, and Honorable Nathan Goff, judge of the circuit court, dissenting.

Sixth. That during the year 1889, when the bonds in controversy were issued, and for many years before and for about four years after said bonds were issued by the county of Wilkes, as petitioners are informed and believe, Honorable James E. Boyd, who concurred, as aforesaid, in the opinion of Judge Morris, was employed as one of the attorneys of the Richmond and Danville Railroad Company, which company controlled and operated, if it did not own, the Northwestern North Carolina railroad during said period, including the year 1889, and that it appears from Exhibit "A," attached to the complaint filed by your petitioners in said superior court of Wilkes county, and from other exhibits attached, that the Board of Commissioners of Wilkes County submitted the question of subscribing to the Northwestern North Carolina Railroad Company at the request of and by reason of promises made by the Richmond and Danville Railroad Company, through its attorney, and confirmed by A. B. Andrews, its vice-president, who was authorized to act, as he certified he did.

Seventh. That during the year 1889 and for more than ten years before and about five years after the year 1889 the said Richmond and Danville Railroad Company controlled and operated, as owner or lessee, many lines of railroad, including the North Carolina railroad, extending from Golds-

boro, in said State, via Greensboro, to Charlotte, in said State; the Piedmont railroad, extending from Danville, in Virginia, to said town of Greensboro, in North Carolina, and the Northwestern North Carolina railroad, extending from Greensboro to Wilkesboro, in North Carolina, and numerous other lines in Virginia, North Carolina, and Georgia, and that, being one of the attorneys of the Richmond and Danville railroad system, as petitioners are informed and believe, during the whole of the year 1889 and prior and subsequent to said year, the said James E. Boyd resided in Greensboro, at the eastern terminus and intersection of said Northwestern North Carolina railroad with the main through line of said Richmond and Danville system, and kept a law office there and was one of the attorneys and advisers of said A. B. Andrews, vice-president of said Richmond and Danville Railroad Company and president of the said Northwestern North Carolina Railroad Company, when the bonds now in controversy were received in payment of a subscription of $100,000 by the said county of Wilkes to the capital stock of said last-named company; and from information petitioners believe and aver that the said James E. Boyd advised the said A. B. Andrews, president of the Northwestern North Carolina Railroad Company and vice-president of the Richmond and Danville Railroad Company, and the constituted authorities of both of said companies, as to the validity of said bonds issued by Wilkes county, and advised their acceptance in payment of such subscription.

Eighth. That petitioners are advised that while they could not object, under the provision of the judiciary act creating the said circuit court of appeals, to the said Judge James E. Boyd as disqualified to sit by reason of having tried the case below, the said James E. Boyd sustained such relations to the said railroad corporations at the time when said bonds were delivered in payment of said subscription that he would not have been an unprejudiced juror and probably

was not free from unconscious bias, as a judge, on any question affecting the validity of said bonds, and that he ought to have objected to sitting as a member of said appellate court on the hearing of said cause decided on said fourth day of February, as petitioners are advised.

Ninth. That your petitioners are advised that, in addition to the three cases in which this honorable court has declared its purpose to exercise its plenary power of issuing writs of certiorari to review the decrees of circuit courts of appeal (one of which is in the case where there is a conflict between the rulings of one of said courts and of the highest court of a State, lying within the bounds to which its jurisdiction extends), it is essential to the fair and impartial administration of justice that such rules of judicial propriety should be prescribed by this honorable court as will insure to all litigants the opportunity to have their causes heard before judges who are not only disinterested and free from conscious prejudice, but who have never sustained such relations to the parties to the cause or the subject-matter as to offer opportunity to instill prejudice into their minds.

Tenth. That prior to said 4th day of February, 1902, when the said decision was rendered in said circuit court of appeals, and about the — day of December, A. D. 1901, and before the judges who sat upon the hearing of said appeal, as petitioners are informed through their counsel, by Judges Goff and Morris, had reached a conclusion and authorized an opinion for the court, Judge Morris sent an outline of the opinion, afterwards filed by him, to Judge Boyd at Greensboro, whereupon, as petitioners are informed and believe, the said opinion of Judge Morris or a copy thereof was sent to Honorable Charles Price, counsel for the respondents, W. N. Coler and Company, at Salisbury, the home of said counsel, and was read by several persons, and that within a few days after said opinion was so sent by Judge

Morris a newspaper published in the town of Salisbury, where said counsel lives, contained an editorial statement that it was reliably informed that the Wilkes County bonds had been declared invalid by the circuit court of appeals, Judge Morris delivering the opinion of the court, Judge Boyd a concurring opinion, and Judge Goff dissenting, and that the giving out of such information, in violation of the rule of propriety usually observed by appellate courts, is worthy of consideration in determining whether Honorable James E. Boyd may not have been unconsciously prejudiced against petitioners and their cause by his previous environments and the relations sustained by him during the year 1889 to said A. B. Andrews, to whom the bonds were delivered, and to the said corporations for which said Andrews was acting, as aforesaid.

Eleventh. That on the 31st day of January, A. D. 1899, upon petition of the defendants J. M. Turner and J. M. Wellborne, as appears of record in this case, Judge O. H. Allen, of the superior court of North Carolina, then riding the circuit of which Wilkes county constituted a part, by order in the case pending in the said superior court of Wilkes county, appointed J. G. Hackett receiver and ordered him to take charge of the moneys in the hands of Clarence Call, treasurer, and such moneys as might thereafter be collected by him as a special tax levied to pay interest accrued and accruing on said bonds, and that said J. G. Hackett filed his bond (which is printed as a part of the record filed herewith) on the 23d day of February, 1899, one day after the temporary restraining order was signed at chambers in the said suit in equity instituted by W. N. Coler and Company against your petitioners and two days before the bill of complaint and subpœna therein were served on petitioners on the 25th day of February, 1899, and nearly two months before Kerr Craige was, at the hearing on April 13, 1899,

appointed receiver by order of the circuit court of the western district of North Carolina.

Twelfth. That since said opinion was filed in said circuit court of appeals on the 4th day of February, 1902, an order has been made by said court of appeals, on motion and suggestion, that this petition was about to be filed, staying the mandate till after the hearing thereof, but that notwithstanding said order, and in the face of the fact that, as your petitioners are advised, the said order of said circuit court, made on the 14th day of April, 1899, appointing Kerr Craige receiver and continuing the injunction, was vacated by appeal, and cannot be enforced until the said mandate shall have been certified to the court below, an order has been issued from said circuit court of appeals since said 4th day of February, 1902, and served upon petitioner, Johnson, treasurer of Wilkes county, for the purpose of inducing the said Johnson to pay to said Kerr Craige, as receiver, all moneys in his hands that have been collected under a levy ordered to meet the interest on said bonds, although the said J. G. Hackett had been appointed, on motion of said Turner and Wellborne, receiver of the same fund and had qualified before the 22d day of February, 1899, when the subpœna was issued in said suit in equity brought by respondents, and that on February 23, 1899, said J. G. Hackett filed his bond as receiver, a copy of which appears in the record filed herewith.

Thirteenth. That prior to the publication of said decision, on the 4th day of February, 1902, the said circuit court of appeals had delivered an opinion, in which all of the members of the court concurred (96 Fed. Rep., 284), in the case entitled The Board of Commissioners of Stanly County *et al.*, appellants, *vs.* W. N. Coler and Company, and had decided that certain bonds issued by the county of Stanly were invalid, and that one of the questions upon which the

validity of said bonds depended was whether the said circuit court of appeals would determine, as it did decide, to follow the decision of the supreme court of North Carolina in holding that sections 1900 to 2000 of the Code of said State did not authorize the issuing of bonds by Stanly county in aid of a railroad built through a portion of said county, and that, the same question having arisen in the case of the Wilkes bonds, a petition to rehear in the said case involving the validity of the Stanly County bonds was filed, the mandate was stayed, and the case was held to await the decision by this honorable court as to the validity of the said Wilkes bonds, but that the said question was not discussed or decided in the said cause sent up on certificate of the judges, but was left open because not within the purview of the instruction asked.

Fourteenth. That subsequently, at the October term of said circuit court of appeals, argument was heard in the two cases together, involving, respectively, the validity of the bonds of Wilkes and Stanly counties (The Board of Commissioners of Wilkes County and J. H. Johnson, treasurer, appellants, *vs.* W. N. Coler and Company, appellees, and The Board of Commissioners of Stanly County *et al.*, appellants, *vs.* W. N. Coler and Company, appellees), and the court, the personnel of which had been changed by substituting Judge Boyd in place of Judge Brawley, delivered an opinion reversing its former decision in the said case involving the validity of said Stanly County bonds and the sufficiency of said sections of the code, as authority for issuing bonds in payment of subscriptions to the stock of railroad companies, Judges Morris and Boyd concurring, and Judge Goff dissenting.

Fifteenth. That your petitioners, therefore, respectfully submit that under the rule laid down in Forsythe *vs.* Hammond referred to, and in the exercise of its plenary power,

this court should authoritatively and finally determine and settle the questions which have given rise to an unseemly conflict between the courts of the United States of America and the supreme court of North Carolina, and should also consider other matters alleged in this petition in order to show that it is just and equitable to review the said ruling of said circuit court of appeals.

Wherefore your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States circuit court of appeals for the fourth circuit, commanding said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said circuit court of appeals in said case therein entitled The Board of Commissioners of Wilkes County *et al.*, appellants, *vs.* W. N. Coler and Company, appellees, No. 319, to the end that the said cause may be reviewed and determined by this court, as provided in section 6 of the act of Congress entitled "An act to establish circuit courts of appeal, and to define and to regulate in certain cases the jurisdiction of the courts of the United States and for other purposes," approved March 3, 1891, or that your petitioners may have such other or further relief or remedy in the premises as to the court may seem appropriate and in conformity with said act and with the recognized principles of law applicable to the matters set forth in the petition, and that the said judgment of the said circuit court of appeals in the said cause and every part theref be reviewed by this honorable court.

And your petitioners will ever pray.

THE BOARD OF COMMISSIONERS OF
WILKES COUNTY and
JOHN H. JOHNSON, *Petitioners,*
By A. C. AVERY,
Attorney and Counsel for Petitioners.

DISTRICT OF COLUMBIA, } ss:
City of Washington, }

Alphonso C. Avery, being duly sworn, says that he is one of the attorneys and counsel for The Board of Commissioners of Wilkes County and J. H. Johnson, petitioners, above named, and as such has had personal charge for them of the defense of the suit in equity brought by W. N. Coler and Company in the circuit court for the western district of North Carolina against your petitioners, while pending in said circuit court, and of the appeal of your petitioners to the circuit court of appeals from the institution of said suit up to the present time, and also appeared in the action in the superior court of Wilkes county entitled The Board of Commissioners of Wilkes County and C. C. Wright *versus* Clarence Call, sheriff and *ex officio* treasurer, and J. M. Turner and J. M. Wellborne, and also in the supreme court of the State of North Carolina, when said action was heard in said court, and when orders were made subsequent to the affirmance of the judgment of said superior court by said supreme court (Commissioners of Wilkes *et al. vs.* Clarence Call *et al.*, 123 N. C., 308, 327), and has a more perfect and accurate knowledge of the facts alleged in the petition than the petitioners themselves, and therefore verifies the same, and that the facts therein stated are true, to his best information and belief.

ALPHONSO C. AVERY.

Sworn to and subscribed before me this the 21st day of February, A. D. 1902.

In witness whereof I have hereunto signed my name and affixed the seal of my office.

[SEAL.]

JOHN J. WILMARTH,
Notary Public, District of Columbia.

27368

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 247.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY AND JOHN H. JOHNSON, SHERIFF AND EX OFFICIO TREASURER OF WILKES COUNTY, PETITIONERS,

vs.

W. N. COLER AND COMPANY, RESPONDENTS.

Petition for Writ of Certiorari Requiring the Circuit Court of Appeals for the Fourth Circuit to Certify to the Supreme Court, for its Review and Determination, the Cause of the Board of Commissioners of Wilkes County and John H. Johnson, ex Officio Treasurer of Wilkes County, Appellants, Against W. N. Color and Company, Appellees.

To the Honorable Supreme Court of the United States:

The petition of the Board of Commissioners of Wilkes County and John H. Johnson, sheriff and *ex officio* treasurer of Wilkes county, respectfully shows:

First. That your petitioners were the appellants and W. N. Coler and Company were appellees in a cause lately pending in the circuit court of appeals for the fourth circuit, wherein an opinion was filed, Judges Morris and Boyd concurring therein and Judge Goff dissenting, on the fourth day of February, A. D. 1902, in said court, and a decree affirming the judgment of the circuit court for the western district of North Carolina was entered in accordance with said opinion (a certified copy of said record being hereto attached), and that the said cause had been heard on certificate of the judges of said fourth circuit at the last term of the supreme court. (See opinion, Supreme Court Reporter, vol. 21, April 15, 1901, p. —.)

Second. That the said cause involves a controversy as to the validity of certain county bonds of the denomination of one thousand dollars each and amounting in the aggregate face value to one hundred thousand dollars, issued by Wilkes county, North Carolina, in the year 1889, and was begun by original bill filed by said W. N. Coler and Company in the circuit court for the western district of North Carolina, at Greensboro, and that the said circuit court, upon the hearing, entered a decree perpetually enjoining the said Board of Commissioners of Wilkes County from in any manner interfering with the performance of a decree declaring said bonds valid, and declaring your petitioner, J. H. Johnson, a trustee, holding thirteen thousand dollars and all of the money collected under the levy of a special tax, to meet the interest on said bonds thereafter coming into his hands, in trust for the sole purpose of paying off the interest due on said bonds to the appellees, W. N. Coler and Company, and

other holders of said bonds (see decree signed by the judge, in record), and that so soon as the mandate of said circuit court of appeals for the fourth circuit shall be sent down in pursuance of the decree entered in conformity to said opinion the said circuit court can proceed to enforce its judgment, which has been affirmed by said circuit court of appeals.

Third. As appears from said record (filed herewith), on the third day of December, 1897, before the filing of said bill by W. N. Coler and Company in said circuit court, an action had been instituted in the superior court of Wilkes county by the Board of Commissioners of Wilkes County and C. C. Wright, a tax-payer, against Clarence Call (then sheriff and *ex officio* treasurer, being the predecessor in office of your petitioner Johnson), to which J. M. Turner and J. M. Welborne became parties defendant and appealed from the judgment of Starbuck, judge, declaring said bonds invalid and restraining said treasurer from paying any part of the principal or interest purporting to be due on them, and that upon the hearing on said appeal the supreme court of North Carolina decided and adjudged (see Commissioners of Wilkes County *vs.* Call, treasurer of Wilkes county, and J. M. Turner and J. M. Welborne, bondholders, 123 N. C. R., 308, 327) that the said bonds were invalid, and affirmed the said judgment of the said superior court restraining said treasurer from paying any part of the principal or the interest claimed to be due on them; whereupon the said J. M. Turner and J. M. Welborne sued out a writ of error to the said supreme court of North Carolina from the Supreme Court of the United States on the 24th day of November, A. D. 1898, and upon motion

the said judgment of the supreme court of North Carolina was affirmed and the said petition and writ were dismissed. (See J. M. Turner and J. M. Welborne, plaintiffs in error, *vs.* The Board of Commissioners of Wilkes County, 173 U. S., 461.)

Fourth. That by reason of a conflict between the said decision of the circuit court of appeals for the fourth circuit and the decision of the supreme court of the State of North Carolina, rendered in the case of The Board of Commissioners of Wilkes County and C. C. Wright, a tax-payer, *vs.* Clarence Call, sheriff and *ex officio* treasurer of Wilkes county, and J. M. Turner and J. M. Welborne, bondholders, 123 N. C., 308, 327, it has become necessary for the Supreme Court of the United States to determine and declare whether the said decision of the circuit court of appeals for the fourth circuit and the decree in accordance with said opinion should be affirmed or whether said circuit court of appeals erred in failing to follow the decision of the supreme court of North Carolina in declaring said bonds invalid under the construction given by said court to the constitution of said State and its laws pertaining to the validity of said bonds, and that the necessity for reviewing said conflicting decisions grows out of the fact (Forsythe *vs.* Hammond, 116 U. S., 506, 514, 515) that so soon as the said circuit court of appeals shall send down its mandate (which is withheld to await this application) the circuit court of the western district of North Carolina will, upon motion of the appellees, order your petitioner, Johnson, treasurer, to pay over to a receiver or to the holders of said bonds any money collected by him

as a levy of special tax to pay the interest on said bonds, and will order your petitioner, The Board of Commissioners of Wilkes County, to levy a tax sufficient to pay any interest due on said bonds over and above such amount as may be in the hands of the receiver or of said treasurer and collected under a levy to meet interest on said bonds, whereas the supreme court of North Carolina affirmed the judgment of Starbuck, judge of the superior court of North Carolina (as appears in the attached record), enjoining and restraining the treasurer of Wilkes county from paying "any portion of the moneys belonging to the county of Wilkes and in his hands upon the principal or interest of said bonds," so that your petitioners would be subject to attachment for contempt by the said circuit court if they refuse to pay or permit the payment of interest on said bonds, and by the superior court of the State if any special-tax fund already collected or hereafter collected by order of said board of commissioners as a special tax should be applied to the payment of interest on said bonds, but for the fact that the State courts may yield to the mandate of said circuit court, as the supreme law of the land.

Fifth. That on the 31st day of January, A. D. 1899, upon petition of the defendants J. M. Turner and J. M. Welborne, as appears of record in this case (printed Record, page 75), Judge O. H. Allen, of the superior court of North Carolina, then riding the circuit of which Wilkes county constituted a part, by order in the case pending in the said superior court of Wilkes county appointed J. G. Hackett receiver and ordered him to take charge of the moneys in the hands of Clarence Call, treasurer, and such moneys as

might thereafter be collected by him as special tax levied to pay interest accrued and accruing on said bonds, and that said J. G. Hackett filed his bond (which is printed as a part of the record filed herewith) on the 23d day of February, 1899, one day after the temporary restraining order was signed at chambers in the said suit of equity instituted by W. N. Coler and Company against your petitioners and two days before the bill of complaint and subpœna therein were served on petitioners, on the 25th day of February, 1899, and nearly two months before Kerr Craige was, at the hearing on April 13, 1899, appointed receiver by order of the circuit court of the western district of North Carolina.

Sixth. That prior to the publication of said decision, on the 4th day of February, 1902, the said circuit court of appeals had delivered an opinion (96 Fed. Rep., 284) in a cause entitled The Board of Commissioners of Stanley County *et al.*, appellants, *vs.* W. N. Coler and Company, and had decided that certain bonds issued by the county of Stanley were invalid, and that one of the questions upon which the validity of said bonds depended was whether the said circuit court of appeals would determine, as it did decide, to follow the decision of the supreme court of North Carolina, in holding that sections 1900 to 2000 of the Code of said State did or did not authorize the issuing of bonds by Stanley county in aid of a railroad built through a portion of said county, and that, the same questions having arisen in the case of the Wilkes bonds, a petition to rehear in the said case involving the validity of the Stanley County bonds was filed, the mandate was stayed, and the case was held to await the decision of the Supreme

Court as to the validity of the said Wilkes bonds, but that the said question was not decided in the said cause sent up on certificate of the judges, but was left open because not within the purview of the instruction asked.

Seventh. That subsequently, at the October term of the said circuit court of appeals, argument was heard in the two cases together, involving respectively the validity of the bonds of Wilkes and Stanley counties (The Board of Commissioners of Wilkes County and John H. Johnson, treasurer, appellants, *vs.* W. N. Coler and Company, appellees, and The Board of Commissioners of Stanley County *et al.*, appellants, *vs.* W. N. Coler and Company, appellees), and the court delivered an opinion reversing its former decision in the said case involving the validity of said Stanley County bonds and the sufficiency of said sections of the code as authority for issuing bonds in payment of subscriptions to the stock of railroad companies, Judges Morris and Boyd concurring and Judge Goff dissenting.

Eighth. That your petitioners therefore respectfully submit that under the rule laid down in Forsythe *vs.* Hammond, referred to, and in the exercise of its plenary power, this court should authoritatively and finally determine and settle the questions which have given rise to an unseemly conflict between the courts of the United States of America and the supreme court of North Carolina.

Wherefore your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States circuit court of appeals for the fourth district, commanding said court to certify and

send to this court, on a day certain to be therein designated, a full and complete transcript of the record of all proceedings of said circuit court of appeals in said case, therein entitled The Board of Commissioners of Wilkes County *et al.*, appellants, *vs.* W. N. Coler and Company, appellees, No. 319, to the end that the said cause may be reviewed and determined by this court, as provided in section 6 of the acts of Congress entitled "An act to establish circuit courts of appeals, and to define and to regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioners may have such other or further relief or remedy in the premises as to the court may seem appropriate and in conformity with said act and with the recognized principles of law applicable to the matters set forth in the petition, and that the said judgment of the said circuit court of appeals in the said cause and every part thereof be reviewed by this honorable court.

And your petitioners will ever pray.

THE BOARD OF COMMISSIONERS OF
WILKES COUNTY AND
J. H. JOHNSON,
Sheriff and ex Officio Treasurer of Wilkes County,
By ALPHONSO C. AVERY,
Attorney and Counsel for Petitioners.

Alphonso C. Avery, being duly sworn, says that he is one of the attorneys and counsel for the Board of Commissioners of Wilkes County and J. H. Johnson, petitioners abovenamed, and as such he had personal charge for them of the defense of the suit in equity brought by W. N. Coler

and Company in the circuit court for the western district of North Carolina against your petitioners while pending in the said circuit court, and of the appeal of your petitioners to the circuit court of appeals from the institution of said suit up to the present time, and also appeared in the action in the superior court of Wilkes county entitled The Board of Commissioners of Wilkes County and C. C. Wright *versus* Clarence Call, sheriff and *ex officio* treasurer, and J. M. Turner and J. M. Welborne, and also in the supreme court of the State of North Carolina, when said action was heard and decided in said court, and when orders were made subsequent to the affirmance of the judgment of the superior court by said supreme court (Commissioners of Wilkes County *et al. vs.* Clarence Call *et al.*, 123 N. C., 308–327), and has a more perfect and accurate knowledge of the facts alleged in the petition than the petitioners themselves, and therefore verifies the same, and that the facts therein stated are true to his best information and belief.

ALPHONSO C. AVERY.

Sworn to and subscribed before me this the 11th day of October, A. D. 1902.

In witness whereof I have hereunto signed my name and affixed the seal of my office, clerk of the supreme court of Burke county, State of North Carolina, a court of record.

[Seal of the Burke Superior Court, North Carolina.]

P. W. PATTON,

Clerk of the Superior Court in and for
Burke County, State of North Carolina.

247

No. 558.

Affidavit for Petitioners.

Office Supreme Court U. S.
FILED
MAY 16 1902
JAMES H. McKENNEY,
Clerk

Filed May 16, 1902.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 558.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY AND JOHN H. JOHNSON, SHERIFF AND EX OFFICIO TREASURER OF WILKES COUNTY, PETITIONERS,

vs.

W. N. COLER AND COMPANY.

AFFIDAVIT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

A. C. AVERY,
Counsel for Petitioners.

(18,411.)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 3195

Supreme Court of the United States

OCTOBER TERM, 1901.

No. 558.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY AND JOHN H. JOHNSON, SHERIFF AND EX OFFICIO TREASURER OF WILKES COUNTY, PETITIONERS,

vs.

W. N. COLER AND COMPANY, RESPONDENTS.

Petition for Writ of Certiorari Requiring the United States Circuit Court of Appeals for the Fourth Circuit to Certify to the Supreme Court, for its Review and Determination, the Cause of The Board of Commissioners of Wilkes County and John H. Johnson, Sheriff and ex Officio Treasurer of Wilkes County, Appellants, vs. W. N. Coler and Company, Appellees.

AFFIDAVIT IN SUPPORT OF THE PETITION.

To the Honorable Supreme Court of the United States:

The petitioners, The Board of Commissioners of Wilkes County and John H. Johnson, sheriff and *ex officio* treasurer of Wilkes county, respectfully show:

First. That your petitioners have been informed through their attorney, and upon such information believe, that the respondents will deny in their answer to the petition already filed that the Hon. James E. Boyd, one of the judges who sat on the hearing in the circuit court of appeals, was one of the attorneys and counsel for the Richmond and Danville Railroad Company, and was residing at Greensboro, North Carolina, when A. B. Andrews, as vice-president of said company, entered into an agreement with the Board of Commissioners of Wilkes County, which agreement constitutes a part of the printed record (see printed Record, pp. 38 to 47), to the effect that the said company would guarantee the building of the Northwestern North Carolina railroad from Winston to Wilkesboro by a time mentioned, and would accept one hundred thousand dollars in bonds of Wilkes county in payment of a subscription of a corresponding amount to the capital stock of said company by said county.

Second. That the petitioners, through their attorney, examined the docket of the superior court of Guilford county from October 1, 1887, to May 15, 1890, and that they found by such examination the following entries tending to show the relation subsisting between the Hon. James E. Boyd and the said Richmond and Danville Railroad Company to have been that of attorney and client, as alleged in the petition, to wit:

(No. 64, page 32.)

"Morehead, D. & K. / Schenck, Boyd. — N. H. D. Wilson *vs.* The Richmond & Danville R. R. Co.

Summons issued July 14th, 1887.
Comp't filed Aug. 30th, 1887.
Ans. Oct. 29th, 1887.
Suit abated August term, 1888, by death of pl'ff.
Judgment."

(No. 69, page 35.)

"Ball. { JESSE GRAVES vs. THE RICHMOND & DANVILLE R. R. Co. } Schenck, Boyd.

Order to sue *in forma pauperis.*
Comp't filed August 30th, 1887.
Jury trial August term, 1888; verdict in favor of pl'ff and assess his damages at $15.00.
Judgment August term, 1888."

(No. 81, page 41 of said docket.)

"Barringer. { SEATON JOHNSON vs. THE RICHMOND & DANVILLE R. R. Co. } Boyd, Schenck.

Summons issued Oct. 1st, 1887.
30 days allowed for pl'ff to file comp't and 30 days thereafter to file answer.
Compromised Mar. 22nd, 1888."

(No. 82, page 43 of said docket.)

"Morehead. { JOHN A. MALCOM vs. THE RICHMOND & DANVILLE R. R. Co. } Boyd, Schenck.

Summons issued Oct. 10th, 1887.
Comp't filed Dec. 14th, 1887.
30 days to def't to ans.
Dec. T., 1887, answer filed.
Jury trial Aug. 7th, 1889.
Verdict, nonsuit, appealed.
Transcript sent to Supreme Court Oct. 17th, 1889."

Third. That it appears from the foregoing entries on the trial docket of said court that Judge Boyd was of counsel in No. 64 on said docket, as set forth above, from July 14,

1887, when summons was issued, till August term, 1888, when the action abated, and that he was of counsel for the defendant, The Richmond and Danville R. R. Company, in No. 82 from the time summons issued, October 10, 1887, until the transcript of record on appeal was sent to the Supreme Court, October 17, 1889, covering the period when the subscription was ratified and the subscription to the capital stock was made.

Fourth. That upon the said docket of the superior court the following entries also appears:

(Docket, page 112, No. 223.)

"John Barringer. } JOHN AUSTIN
Schenck, Boyd. } *vs.* THE RICHMOND & DANVILLE R. R. Co.

Sum. issued June 29th, 1889.
Order to sue *in forma pauperis.*
Complaint filed June 29th, 1889.
30 days to file answer, Aug. T., 1889.
Answer filed Sept. 17th, 1889."

(No. 229, page 115, docket.)

"J. Barringer. } WILLIAM SANDERS
Schenck, Boyd. } *vs.* THE RICHMOND & DANVILLE R. R. Co.

Summons issued Aug. 14th, 1889.
Comp't filed Aug. 14th, 1889.
30 days to file answer, Aug. T., 1889.
Ans. filed Sept. 17th, 1889."

(231, page 116, docket.)

"Barringer, Scott. / Schenck, Boyd. — WASHINGTON PRUETT *vs.* THE RICHMOND & DANVILLE R. R. Co.

Summons to Aug. term, 1889.
30 days to file complaint and 20 days thereafter to answer.
Comp't filed Sept. 23rd, 1889.
Ans. filed Nov. 18th, 1889."

(No. 242, page 121.)

"Scott. / Schenck, Boyd. — A. B. WHITE *vs.* THE RICHMOND & DANVILLE R. R. Co.

Summons issued Nov. 20th, 1889.
Comp't filed Dec. 11th, 1889.
30 days to file answer.
Answer filed Feb. 22nd, 1890.
Motion to remove.
Reply filed April 11th, 1890.
Pl'ff allowed to avert complaint, &c."
(Other entries not copied.)

(No. 243, page 122.)

"D. & K. / Schenck, Boyd. — MARY E. CAMPBELL, Adm'x, *vs.* THE RICHMOND & DANVILLE R. R. Co.

Summons issued Nov. 26th, 1889.
30 days to file comp't and 30 days thereafter to ans."

(Page 134, No. 268.)

"Forbis.	J. R. Simpson	
	vs.	
Schenck.	The Richmond & Danville R. R. Co.	

Summons issued Feb. 4th, 1890.
Order to sue *in forma pauperis.*
30 days to file comp't and 30 days thereafter to ans.
Comp't filed Mar. 2nd, 1890
Ans. filed Mar. 31st, 1890.
Judgment, Dec. T., 1890."

(No. 285, page 143.)

"Barringer.	W. H. Chilcott	
	vs.	
Barringer, Schenck, Boyd.	The Richmond & Danville R. R. Company.	

Summons issued Mar. 27th, 1890.
Order to sue *in forma pauperis.*
Comp't filed April 28th, 1890."

Fifth. That it appears from the foregoing entries on the docket of said court that the Hon. James E. Boyd was of counsel in various cases for the Richmond and Danville Railroad Company from October, 1887, to March, 1890; and petitioners aver that they find upon the docket of said superior court, at page 61, No. 122, the following entries:

"Douglass.	Jesse M. Douglass	
	vs.	
Schenck.	The Northwestern North Carolina Railroad Company.	

Summons issued 22nd April, 1888."

And that while no name but that of Judge Schenck is marked as counsel for the defendant in the last-named action, it was pending during the period when the Hon. J. E. Boyd was acting as counsel for the controlling company (The R. & D. Co.).

The petitioners respectfully submit that the counsel for the respondents contended before the circuit court, as appears of record, that the facts that said last-named case was still pending at the time of a foreclosure sale of the Northwestern North Carolina Railroad in 1894, and that Justice Douglass, then a practicing attorney and attorney for plaintiff in said action, forbade said foreclosure sale, disqualified him from sitting afterwards and writing the opinion in Call *vs.* Commissioners (123 N. C., 334), because the bonds in controversy were issued in payment for stock of said company, and insist that the said controversy as to the validity of bonds was not a proper subject of consideration by Hon. James E. Boyd, who was of counsel for the Richmond and Danville Railroad Company at the time of the foreclosure sale and for the Southern Railway Company immediately after said foreclosure sale, and was, as petitioners are informed and believe, receiving a stated annual salary as counsel for the Richmond and Danville Railroad Company before said foreclosure sale, and for the Southern Railway Company immediately thereafter.

Sixth. That petitioners respectfully pray the court to be allowed to submit the foregoing in support of their contention that the Hon. James E. Boyd was disqualified to sit upon the hearing of the cause in the circuit court of appeals for the fourth circuit, at Richmond, and petitioners aver that they have raised the said question as to his disqualification in the assertion of what they conceive to be their legal rights, and disavow any purpose or desire to criticise or reflect upon the official conduct of said judicial

officer, except in so far as it is necessary to do so in order to present a question of law, upon which they rely.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY AND
JOHN H. JOHNSON, *Petitioners*,
By —— ——,
Attorney and Counsel for Petitioners.

STATE OF NORTH CAROLINA, }
County of Burke. }

Alphonso C. Avery, being duly sworn, says that he is one of the attorneys and counsel for The Board of Commissioners of Wilkes County and J. H. Johnson, petitioners, above named, and as their attorney has investigated the matter mentioned in the foregoing affidavit, and that the allegations therein contained are true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

ALPHONSO C. AVERY.

Sworn to and subscribed before me this 14th day of May, A. D. 1902.

In witness whereof I have hereunto signed my name and affixed the seal of my office.

[SEAL.] A. M. INGOLD,
Notary Public in and for Burke County, North Carolina.

27370

No. 558. 247

Off. of Avery & Coleman

Filed May 15, 1902.

Office Supreme Court U.S.
FILED
MAY 15 1902
JAMES H. McKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 558.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY AND JOHN H. JOHNSON, SHERIFF AND EX OFFICIO TREASURER OF WILKES COUNTY, PETITIONERS,

AGAINST

W. N. COLER & CO., RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI.

BRIEF FOR PETITIONERS.

A. C. AVERY, Attorney and Counsel for Petitioners.

Filed.....A. D. 1902

EDWARDS & BROUGHTON, PRINTERS AND BINDERS, RALEIGH.

SUPREME COURT OF THE UNITED STATES.

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AGAINST

W. N. COLER & CO., RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI.

BRIEF FOR PETITIONERS.

A. C. AVERY, COUNSEL FOR PETITIONERS.

THIS CASE BELONGS TO ONE OF THE CLASSES IN WHICH THE COURT HAS ANNOUNCED THAT IT WILL EXERCISE ITS PLENARY POWER BY GRANTING WRITS OF CERTIORARI TO THE CIRCUIT COURTS OF APPEAL.

"We reaffirm in this case the propositions heretofore announced, to-wit, that the power of this Court in *certiorari* extends to every case pending in the Circuit Courts of Appeal, and may be exercised at any time during such pendency, provided the case is one which, but for this provision of the statute,

would be finally determined in that Court, and, further, that while this power is co-extensive with all possible necessities and sufficient to secure this Court a final control over the litigation in all the Courts of Appeal, it is a power which will be sparingly exercised, and *only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflicts between two or more Courts of Appeal, or between Courts of Appeal and the Court of a State, or some matter affecting the interest of this Nation in its internal or external relations, demands such exercise.*

"Among the considerations thus suggested are those which *indicate why, in this case, the Court properly exercised its power and issued the writ of certiorari. There was a conflict between the decision of the Circuit Court of Appeals for the Seventh Circuit and the Supreme Court of the State of Indiana.* The latter Court had declared that the proceedings by which the contiguous territory was annexed to the city of Hammond were legal, and, therefore, that the territory was to be considered by all the officers of the State of Indiana as within the territorial limits of the city. The United States Circuit Court of Appeals, by its decision in this case, had declared that such annexation proceedings were invalid, and that the property of the petitioner was not within the city limits. This tract of plaintiff's was not on the extreme limit of lands sought to be incorporated into the city, and, if the decision of the Circuit Court of Appeals was enforced, there would be a tract of a few hundred acres within the exterior boundaries of the city of Hammond, as defined by the judgment of the Supreme Court of the State, withdrawn from the city jurisdiction, and, in fact, excepted from its territorial limits. *All the unfortunate possibilities of conflict and collision which might arise from these adverse decisions were suggested when this application for certiorari was made, and, although no final decree had been entered, it seemed to us a duty to bring the case and question here for examination at the earliest possible moment.*"

Forsyth v. Hammond, 166 U. S., 506, 514, 515.

It will be seen by reference to pages 71, 72, 96 and 97 of the printed record, that the judgment affirmed by the Supreme

Court of North Carolina, in Commissioners v. Snuggs, 121 N. C., 394, is in conflict with the judgment of the Circuit Court for the Western District of North Carolina, affirmed by the decision of the Circuit Court of Appeals for the Fourth Circuit, at Richmond, February 4, 1902 (see printed record, page 123).

Petitioners are advised that it is sufficient, upon the hearing of the preliminary motion, to show that the case referred to in the petition belongs to a class in which the Court has declared its purpose to exercise its plenary power, by reviewing the conflicting decisions, and determining what is the law.

The two Courts whose difference have given rise to this conflict, being Courts of last resort, whose decisions, as a rule, must be followed, the petitioners take it for granted that so grave a question will not be considered by the Court which is the final arbiter without a full discussion upon the merits, after settling the preliminary motion. They will therefore, after presenting the contention that the writ ought to be granted, because Judge Boyd was disqualified on account of having been of counsel, submit a short brief to show that the issues of law raised have, at every stage of their consideration in different Courts, and upon every question involved, given rise to conflict of opinion between learned and distinguished jurists, and that these differences, according to the settled practice of the Court, will be reviewed only after hearing counsel for both parties and after due deliberation.

JUDGE BOYD WAS DISQUALIFIED BY REASON OF HIS PREVIOUS RELATIONS TO THE RICHMOND AND DANVILLE RAILROAD COMPANY, AT THE INSTANCE AND FOR THE BENEFIT OF WHICH THE SUBSCRIPTION PAID IN COUNTY BONDS WAS MADE TO THE NORTHWESTERN NORTH CAROLINA RAILROAD COMPANY, WHICH CONSTITUTED A PART OF THE RICHMOND AND DANVILLE SYSTEM.

FACTS APPEARING IN THE RECORD.

By reference to pages 39 and 40 of the printed record, it will appear that the order for an election to determine whether Wilkes County should make the subscription, for payment of

which the bonds were issued, was not made until a proposition had been made by the Richmond and Danville Railroad Company to build a road through Wilkes County. The order recites (on page 38, printed record) that it is made in "accordance with the proposition submitted by the Richmond and Danville Railroad Company for the extension of the Northwestern North Carolina Railroad," and it appears from the printed record (page 39) that, under the said order of election in the record of the Commissioners, the following was written by the attorney of said company:

"The above order is made at the request of the Richmond and Danville Railroad, and with their full concurrence.

"R. B. GLENN,

"Attorney for R. and D. R. R. Company."

On page 40 of the printed record is a telegram from A. B. Andrews, President Northwestern North Carolina Railroad Company, and Vice-President of the Richmond and Danville Railroad Company, to R. B. Glenn, which appears to have been delivered to said Commissioners as a ratification of the agreement by the attorney, and it is in the following words:

"Raleigh, N. C., June 1, 1887.

"*To R. B. Glenn:*

"I learn that it has been said by some parties of Wilkes County that the proposition that you made as our attorney to extend the Northwestern North Carolina Railroad was not binding on us, as it was made by you as attorney. I hereby confirm your action, and the proposition is binding on the company.

"A. B. ANDREWS."

By reference to printed record (page 39), it will appear that the Commissioners were induced to make the subscription by the assurance that the Richmond and Danville Railroad Company would take the bonds in payment of the subscription, and would construct the road to Wilkesboro, and that the said order contained a recital that, "Whereas, the Richmond and Danville Railroad Company has made a proposition to the County Commissioners of Wilkes County to extend the Northwestern North

Carolina Railroad from Winston, N. C., to Wilkesboro, N. C., in the event that Wilkes County will subscribe one hundred thousand dollars to the capital stock of said company, to be paid in bonds of said county, according to agreement filed in office of Register of Deeds," etc.

"Now, therefore, in pursuance of agreement filed, and in accordance with the stipulation therein contained, we do hereby subscribe one hundred thousand dollars to the capital stock of said company, according to stipulations of said agreement," etc.

FACTS ALLEGED IN THE PETITION.

In sections 6 and 7 of the petition, it is alleged that during the year 1887, when the bonds were issued by Wilkes County, for many years before, and about four years after 1887, Judge Boyd was employed as one of the attorneys of the Richmond and Danville Railroad Company, which controlled and operated a system of railroads permeating the State of North Carolina, and adjacent States, and including the Northwestern North Carolina Railroad; and that Judge Boyd, in 1889, resided and had a law-office in Greensboro, the point at which said last-named road intersected with the main line of the system, and, according to the information and belief of petitioners, advised said Andrews that the bonds in controversy were valid.

LAW RELATING TO THE QUESTION OF DISQUALIFICATION ON THE GROUND OF PREVIOUS INTEREST AND BIAS.

When, by section 3 of the act of March 3, 1891, it was provided that a Judge who should hear or try a case in the Circuit Court or District Court, should be disqualified from sitting in the Appellate Court, when his own ruling should be reviewed, the addition of this new and salutary restriction was intended as another safeguard to litigants against bias on the part of the Judges of the Appellate Court, not to abrogate those rules that had always been held to be inherent in the very nature of such Courts, and which was sanctioned by immemorial usage in the English and American Courts, and which were founded upon the experience of mankind, that in order to a fair and impartial

execution of the laws, they must be administered by Judges and jurors who have had no cause to imbibe prejudice, and have not been subjected to temptation to become biased against any of the parties to actions or suits or their causes.

"The common law forbade a man being the judge of his own cause, as if 'an act of Parliament gives a man power to try all cases that arise within the manor of Dale; yet, if a cause should arise in which he himself is a party, the act is construed not to extend to that, because it is unreasonable that any man should determine his own quarrels.'

"1 Blackstone, 94."

White v. Connely, 105 N. C., 65.

"There is also a maxim of law regarding judicial action which may have an important bearing upon the constitutional validity of judgments in some cases. No one ought to be a judge in his own cause; and so inflexible, and so manifestly just is this rule, that Lord Coke has laid it down that, 'Even an act of Parliament made against natural equity, as to make a man a judge in his own cause, is void of itself; for *jura naturae sunt immutabilae*, and they are *leges legum*.'

"*This maxim applies in all cases where judicial functions are to be exercised, and excludes all who are interested, however remotely, from taking part in their exercise.*"

"*It is not left to the discretion of a Judge, or to his sense of decency, to decide whether he shall act or not; all his powers are subject to this absolute limitation;* and when his own rights are in question, he has no authority to determine the cause. Accordingly, *where the Lord Chancellor, who was a shareholder in a company, in whose favor Vice-Chancellor had rendered a decree, affirmed this decree, the House of Lords reversed the decree on this ground.* Lord Campbell observing, 'It is of last importance that the maxim that "No man is to be a judge in his own cause," should be held sacred. And that is *not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest.*' 'We have again and again set aside proceedings in inferior tribunals, because an individual who had an interest took part in the decision. And it will have a most salutary ef-

fect on those tribunals when it is known that this high Court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree, on this account, was a decree not according to law, and should be set aside.'

"This will be a lesson to all inferior tribunals, to take care not only that in their decrees they are not influenced by their personal interest, *but to avoid the appearance of laboring under such influence.*" *Dimers v. Grand Junction Canal, 3 House of Lords Cases. 759; Cooley's Cons. Lim., 410-11; Coke Lit., 212.*

"No man is to be a judge in his own cause"—*the rule "is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest."*

Dimers v. Grand Junction Canal, *supra.*

No attorney who is true to his client can fail to be biased in deciding a legal question which affects his interest. The interest of the client becomes, necessarily, the interest of faithful counsel. Judge Boyd must have felt an interest in *securing* his client, the Richmond and Danville Railroad Company, which guaranteed the building of a railroad and furnished means to build it, in consideration of the delivery of the very bonds, the validity of which is now in question, and could not be expected to divest himself of that prejudice when required to pass upon the validity of the bonds.

If the House of Lords reversed a ruling of the Lord Chancellor in favor of a corporation, because at the time he was a shareholder, what shall be said of the ruling of a Judge in favor of the validity of certain municipal bonds, accepted in lieu of money as a subscription to capital stock, and for money advanced for the construction of a railroad by "a corporation of which such Judge was the counsel when the bonds were accepted"? If the two cases can be distinguished in principle, the distinction is too refined and shadowy for one who takes a broad, common sense view of the question involved.

"No Clerk can act as such, in relation to any estate or proceeding, if he has, or claims to have, any interest therein, or if he is so related to any person having or claiming to have such

interest that he would by reason of such relationship be disqualified as a juror."

Headnote in Land Company v. Jennett, 128 N. C., 3.

It was held in the same case that the probate, by an interested Clerk, of a deed was a nullity. No Court would have failed to sustain a challenge to a juror, in a controversy involving the validity of bonds, if it had appeared that he had been agent or attorney in fact for a corporation, when such corporation accepted the very same bonds as valid and in lieu of money.

THE GENERAL RULE IS THAT A DISQUALIFYING INTEREST ON THE PART OF A JUDGE MUST BE A PECUNIARY INTEREST. BUT THE FORMER RELATION OF COUNSEL IMPLIES FORMER PECUNIARY INTEREST, AND CONSEQUENTLY EXISTING BIAS.

A Judge can not, as a rule, be disqualified unless he has a present pecuniary interest in the controversy or in the subject-matter of the litigation. But the exception to the rule is that, when an attorney has been consulted as to a disputed matter, whether a suit is pending or is subsequently brought to settle such controversy, and whether he receives a fee or not, he is disqualified to sit as a Judge, either in such pending suit, or an action resulting subsequently from the dispute.

State v. Hocker, 34 Fla., 25.
Slaven v. Wheeler, 58 Texas, 23.
East Rome Town v. Cothran, 81 Ga., 350.

The broader and better rule is, that a Judge should avoid the very appearance of bias, prejudice or partiality, and should be prohibited from sitting in any case in which his interest in the subject-matter of the action is such as would naturally influence him one way or the other.

Heilbron v. Campbell, 23 Pac. Rep., 122 (Cal.).

It has been held that, where a Judge had received a general retainer from one of the parties, it would justify a demand for

trial before another Judge, and that is our case. The Judge here was retained generally as counsel for the Richmond and Danville Railroad Company, which built the road and took the bonds under an agreement to construct it.

Kern Valley Water Co. v. McCord, 70 Cal., 646.

IF THE DISQUALIFICATION HAD NOT RENDERED THE JUDGMENT VOID, THERE WOULD HAVE BEEN GOOD GROUND FOR EXERCISING THE AUTHORITY GIVEN IN SEC. 6 OF THE ACT OF MARCH 3, 1891.

THE HISTORY OF THESE CONFLICTS OF OPINION.

FIRST. The bonds were declared invalid, and The Code, sections 1996 to 2000, were declared by the Supreme Court of North Carolina insufficient to authorize their issue (four Justices concurring and but one dissenting), in *Commissioners v. Snuggs*, 121 N. C., 394.

SECOND. The Circuit Court of Appeals reviewed the opinion of the Circuit Court of the Western District of North Carolina, declaring the bonds valid, and (all of the Judges, Goff, Morris and Brawley, concurring), reversed the ruling of the Circuit Court and followed that of the Supreme Court of North Carolina.

Commissioners v. Coler, 96 Fed. Rep., 284.

THIRD. Upon petition to rehear, filed in the Court of Appeals, the mandate was stayed and the cause was held to await the decision of the Supreme Court upon the hearing on certificate in Wilkes County v. Coler, 180 U. S., 506-524, but the Court declined to pass upon the question whether Wilkes County (or Stanly County) was empowered by sections 1996 to 2000 of The Code of North Carolina, to issue bonds in aid of railroads extending through their counties, because that did not appear to be one of the questions certified.

FOURTH. It had been held to be the duty of the Circuit Court of Appeals to follow the construction given to section 14, Article II, of the Constitution by the State Court, and one

of the remaining questions is, whether the Federal Courts should follow the construction given by the State tribunal to sections 1996 to 2000 of The Code.

FIFTH. A bare majority, composed of Judges Morris and Boyd, decided to overrule the former decision of the Court of Appeals, while Judge Goff dissented. (See opinions in the printed record, at page 110 *et seq.*)

The Established Rule of the Federal Courts is to Resolve all Reasonable Doubts in Favor of the Construction Placed by the State Tribunals Upon Their Own Statutes.

"The construction by the Courts of a State of its Constitution and statutes is, as a general rule, binding on the Federal Courts. We may think that the Supreme Court of a State has misconstrued its Constitution or its statutes, but we are not at liberty therefore to set aside its judgments. That Court is the final arbiter as to such questions. In Claiborne County v. Brooks, 111 U. S., 400, 410 (28—470, 474), it was said: 'It is undoubtedly a question of local policy with each State, what shall be the extent and *character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest Courts on this subject will be regarded as authoritative by the Courts of the United States;* for it is a question that relates to the internal constitution of the body politic of the State.' See also Burgess v. Seligman, 107 U. S., 20, 33; Butcher v. Cheshire R. Co., 125 U. S., 555; Detroit v. Osborne, 133 U. S., 492; South Branch Lumber Co. v. Ott, 142 U. S., 622; Kaukauna Water-Power Co. v. Green Bay and M. Canal Co., 142 U. S., 254; McElvaine v. Brush, 142 U. S., 155; Stutsman County v. Wallace, 142 U. S., 293, quoting Norton v. Shelby County, 118 U. S., 425, and Gromley v. Clark, 134 U. S., 338; Morley v. Lake Shore M. S. R. Co., 146 U. S., 162; Bauserman v. Blount, 147 U. S., 647; May v. Teney, 148 U. S., 60; Baltimore and O. R. Co. v. Baugh, 149 U. S., 368, 373; Lewis v. Monson, 151 U. S., 545; Balkam v. Woodstock Iron Co., 154 U. S., 177, quoting Leffingwell v. Warren, 67 U. S., 2 Black., 599, 603."

Where it is found that no construction had been given to a statute by the State Court, when the transaction was entered into, the Federal Courts "*will lean toward an agreement of*

views with the State Courts, if the question seems to them balanced with doubt."

Burgess v. Seligman, 107 U. S., 17, 38.

It is true that all Courts incline to hold commercial paper, in the hands of innocent purchasers for value, valid, but nowhere, except in the concurring opinion of Judge Boyd, and in the brief of Mr. Price, have we found an intimation that in order to uphold municipal bonds, "if it can do so under any circumstances," or "if it is possible to do so," a Federal Court must lean against instead of in favor of a ruling by a State tribunal, that the creation of a debt by a municipality was *ultra vires*. Justice Gray, in Louisville R. Co. v. Louisville Trust Co., 174 U. S., 573, 574, said, quoting 10 Wall, 604:

"Where a party deals with a corporation in good faith, *the transaction is not ultra vires, and he is unaware of any defect in authority*, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists."

THE CONTENTION OF THE PETITIONERS IS THAT THE AUTHORITY TO SUBSCRIBE WAS LIMITED TO A CERTAIN CLASS OF COUNTIES. IF A COUNTY WAS NOT A DONEE OF SUCH POWER, BY REASON OF BELONGING TO SUCH CLASS, IT COULD NOT CONFER SUCH AUTHORITY ON ITSELF BY RECITATIONS EITHER IN BONDS OR IN THE MINUTES OF ITS GOVERNING OFFICIALS.

If the Legislature had not intended to restrict the power of "the Boards of Commissioners of the several counties," to aid railroads, to those in which the citizens of the county may have an interest, it would have *omitted the qualifying clause "when necessary to aid in the completion of a road in which the citizens of the county may have an interest,"* and have allowed any county to subscribe stock "to any railroad company or companies." The qualifying words are surplusage, according to the construction of the Circuit Court of Appeals.

If the clause descriptive of the company to which the subscriptions might be made is not meaningless and mere surplusage, it confers power only on a certain class of counties. *If a county not authorized attempts to subscribe, it is acting ultra vires.* Whether there is anything in the transaction to excite suspicion or not, a purchaser is bound to look to the power of a municipality to issue bonds, and must lose when he buys bonds issued without Legislative authority.

The language of Code, section 1996, relied upon as authority for the issue of the bonds, is as follows: *"The Boards of Commissioners of the several counties shall have power to subscribe stock to any railroad company or companies when necessary to aid in the completion of any railroad in which the citizens may have an interest."*

What is meant by the words, "any railroad in which the citizens of a county may have an interest"? The petitioners submit that the Courts of America and the British Empire have uniformly construed the word "interest," in such connections, to mean "pecuniary interest" in the thing referred to—here, in the railroad.

DEFINITION OF THE WORDS "INTEREST" OR "INTERESTED."

In construing a statute prohibiting any member of a council from having a direct or indirect interest in a contract of the corporation, the Supreme Court of Michigan, in Swedly v. Kirby, 79 N. W. R., 188, said: "This indicates that a pecuniary interest was intended. Anderson defines interest as such relation to the matter in issue as creates a liability to pecuniary loss or gain from the event of a suit."

Taylor v. Highway Commissioners, 88 Ill., 527.
Northampton v. Smith, 11 Met. (Mass.), 395.

In a case where the question was whether a salaried employe of a firm of contractors was interested in the contracts of the firm, the Pennsylvania Court said: "The word interested does not mean anything but pecuniary interest, and of this there is no evidence."

Dunlap v. Philadelphia, 13 W. N. C. (Pa.), 98.

The Supreme Court of Illinois, in passing upon the questions whether the State had an interest, within the meaning of the statute in a *quo warranto* proceeding to try title to an office, said: "The interest which a State must have in such a cause is *a substantial interest, as a pecuniary interest.*"

McGrath v. People, 100 Ill., 461.

In State v. R. Co., 36 N. J. L., 164, the Court, drawing the distinction between estates and interest in a statute providing for condemnation of right-of-way, said: "Under the more comprehensive term, 'persons interested,' are included not only persons in whom is vested the legal title which the company proposes to acquire, * * * but also other individuals having some independent right or interest therein, * * * such as an easement of a right-of-way, inchoate rights of dower or courtesy, or incumbrances, such as by judgments or mortgages, which are charges on the legal estate. The object is * * * that their interest may be extinguished by payment."

The Supreme Court of California, construing a statute allowing a party "beneficially interested" a writ of review of an order of the Board of Supervisors, granting a right to use a highway for the purpose of constructing a railroad, held that an affidavit alleging that "affiant, in common with others living along the highway, would be damaged," was insufficient, and said:

"It does not appear by the petition in this case that the *petitioner has any other or greater right in the highway mentioned therein than any other citizen of the State.* * * * In an application made by a private party, *his interest must be of a nature distinguishable from that of the mass of the community.*"

Linden v. Alneda County, 45 Cal., 7.
Ashe v. Calusa County, 71 Cal., 236.

If a person living on a highway has *"no other or greater interest therein than any other citizen of the State," then a person living on or in the vicinity of an improved highway—a railroad —has no other or greater interest in the railroad* than any other citizen of the State, and the citizens of Wilkes County,

whether they live along or away from the line of railway, *"have no other or further interest therein than any other citizen of the State."*

ADDITIONAL AUTHORITIES CONSTRUING "INTEREST" AS MEANING A PECUNIARY, VALUABLE OR BENEFICIAL INTEREST, NOT MERELY A PATRIOTIC OR SENTIMENTAL INTEREST WHICH A CITIZEN OF A STATE OR COUNTY FEELS IN A PUBLIC IMPROVEMENT.

As shareholders, by reason of a subscription already made, the citizens of the county would have an interest in any contract from which, as shareholders, they might derive profit, as by making an incomplete road more valuable by extension.

Todd v. Robinson, Q. B. D., 739.
Hunnings v. Williamson, 112 Q. B. D., 536.

"Beneficial interest" was construed to mean present, vested or valuable interest, by the Supreme Court of Massachusetts.

Dexter v. Cotting, 149 Mass., 92.

Interest in an estate or action, where requisite to give a person standing in Court as a party to an action, is unversally construed to be a beneficial, valuable, vested or pecuniary interest.

Bachman v. Packard, Q. Fed. Cas., No. 709.
Northampton v. Smith, 11 Met. (Mass.), 395.
Goodall v. Tuttle, 10 Fed. Cas., No. 5533.
Whitney v. Brittain, 16 N. Y. App. Div., 457.
Hevin v. Valcano, etc., Co., 13 Ca., 62.
Bugher v. Gott, 3 N. Y. Supp., 518.
Whitney v. Barley, Q. B. D., 154.
Burgess v. Clark, 14 Q. B. D., 735.
Gasquet v. Johnson, 1 La., 431.

The interest which disqualifies a Judge from sitting, is held to be "a property interest" in the action and its results, not "the interest which he may have in common with other citizens in a public matter."

Sauls v. Freeman, 24 Fla., 209.
Chicago, etc., R. Co. v. Kellogg, *supra*.

The foregoing list of authorities might be enlarged by adding scores of cases in which the word interest is interpreted in the same way, but it is not deemed necessary to cite any but the following:

Taylor v. Norment, 88 Ill., 327.
Wilson v. Railroad, 37 Ala., 358, 360.
In Real Estate of White, 37 Cal., 100.
Shelton v. Derby, 27 Conn., 415, 421, 425.
Smith v. Phillips, 62 Ala., 578.

"Interest" is defined in dictionaries, where it relates to property such as railroads, generally as a legal concern of a person in a thing, or in the conduct of another person, whether it consist in the right of enjoyment of or benefit from property or right to claim an advantage, or be subjected to a liability on account of the conduct or management of property.

In other words, an interest is either a legal right in a thing, as property, or such a relation to it as to enable one to participate in the profits of its conduct or management, or share in the loss arising from its management.

One of the definitions given by the Standard Dictionary of *"interested" is "being a part-owner; as one interested in railroad shares."*

It is contended for the petitioners that the citizens of a county, collectively, could only be interested, in the ordinary and obvious meaning of the word as applied to railroads, where the corporation, which embodied all rights of the citizens as a body, has some interest in the shares of its stock. This definition is in harmony with the contention of the petitioners that the last clause of section 1996 is surplusage, unless it restricts the power to subscribe to roads in which the county may already own shares of stock.

The lexicons and law-books uniformly define an interest in any kind of property in the same way. If the word has no technical meaning, then it must be interpreted according to its ordinary meaning.

Adams v. Turrentine, 30 N. C., 147.
Blue v. McDuffie, 44 N. C., 13.
Randall v. Railroad, 107 N. C., 748, 750.

Whatever rule of construction may be followed, the interpretation must be the same, and, seeing this, on the first hearing, Judge Goff incorporated into the opinion the entire discussion of this point by the Supreme Court of North Carolina in Commissioners v. Snuggs, expressing briefly the approval of the Court.

On the other hand, in the opinion delivered on February 4, 1902, in Commissioners of Stanly v. Coler & Company, the Court assumes that the Legislature did not mean "interest" in the sense of "pecuniary interest," because the qualifying word was inserted in the Constitution, in reference to the State, but was omitted from the statute. The Court said the words, "in which a citizen of a county may have an interest" in a railraod would seem to be the appropriate words to express the general interest which the whole body of the people of a county have in a railroad which they believe will benefit them, as distinguished from direct pecuniary interest of the county as a corporation." This arbitrary construction of the word by the Court of Appeals is in direct conflict with the authorities cited, and is not supported by a single reference to law-book or lexicon. The construction of the State Court is set aside without a discussion, because that Court, following the overwhelming weight of authority, held that the word "pecuniary" could only intensify and emphasize the word "interest," and that the word "interest," in such a connection, was intended to denote pecuniary interest, and was, except for the purpose of emphasis, surplusage. *But half of section 1996 is declared surplusage by the Court of Appeals in order to lean against the construction of the State Court.*

This opinion is remarkable in that it disposes of the ruling of a State Court with so little ceremony, and in that, though overruling the construction given by the State Court to its own statute, it substituted its own interpretation, without citing an authority to sustain its views. Indeed, no reason whatever is given for rejecting the definition of the Court, though it would seem that the consensus of opinion in all Courts has been that, when applied to property, an interest means a pecuniary interest; and no regret is expressed for disregarding the State's construction.

Was it not reasonable and proper that the Supreme Court of

North Carolina should adopt the definition given both by law-books and dictionaries, and should have added that such an interpretation of a statute enacted by the reconstruction Legislature was in harmony with the policy of the reconstruction Constitution? Of this, that Court, having knowledge of the peculiar conditions in the State and its policy, as indicated by a comparison of its various laws and their interpretations, was certainly more competent to judge. (See discussion of policy, *post.*)

Judge Boyd, in the concurring opinion, in Commissioners v. Coler, *supra*, declares it to be both the right and duty of the Court of Appeals to "construe the language of sections 1996-2000 according to their natural and proper meaning"; but he fails to refer to law-books or lexicons from which that Court gathered the "natural and proper meaning."

We challenge the respondents to produce authority of Courts or scholars for such a definition of interest as applied to a railroad.

The statute requires the subscription must be "necessary to aid in the completion of any railroad," etc.

The petitioners respectfully insist that the word "COMPLETION" has also a most material bearing upon the question of Legislative authority, that is, in indicating the *class of counties* to which the act refers.

Judge Goff, in delivering the unanimous opinion of the Circuit Court of Appeals, 96 Fed. R., *supra:*

"But did the sections above mentioned give additional and complete authority to order the elections, issue the bonds and levy the taxes to pay them, principal and interest? Section 1996 is in these words: 'The Boards of Commissioners of several counties shall have power to subscribe stock to any railroad company or companies when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest.' It will be necessary, in order that that section may be construed to give authority to the Commissioners to issue the bonds, that the language should include a railroad not begun to be built before the Constitution was adopted; that the word 'completion' should be construed 'building' or 'con-

struction,' extending even to the building of a new road; for, in the case before us, it appears that the road had not begun to be built. We can not see why the word 'completion' should be thought to have been used by the legislators in any other sense than the one most usual and natural. Ordinarily, the words 'to complete' are understood to mean 'to finish,' 'to fulfill,' and the word 'completion' to mean the 'finishing' or 'accomplishing in full' of something which has already been commenced; as, for instance, it is most frequent to hear the word 'completion' used in connection with the finishing years and months of the education of the young. The object of the statute must have been to provide, by general act, means by which the counties, without special legislation for each county by separate bills, might be enabled to complete unfinished railroads in which the counties had a pecuniary interest. At the time of enactment of the statute of 1868-'69, and always since that time, any county of the State, duly observing the limitations of section 7 of Article VII of the Constitution, and under an act passed according to the requirements of section 14, Article II, of the Constitution, could, and can, subscribe to the capital stock of a railroad company, whether unfinished or to be begun. *The act of 1868-'69, however, considering the condition of the affairs then existing—that is, that there were counties which had a pecuniary interest in the railroads that had been begun, but unfinished—enabled such counties to make subscriptions of bonds to complete such unfinished roads at the earliest moment and with the least cost, by general law, passed according to section 14, Article II, of the Constitution.*"

THE LEGISLATURE OF NORTH CAROLINA INTENDED TO EMPOWER ONLY THOSE COUNTIES WHICH HAD ALREADY INVESTED IN THE STOCK OF A RAILROAD COMPANY, BUT HAD NOT THEREBY EFFECTED THE COMPLETION OF THE LINE, TO MAKE AN ADDITIONAL SUBSCRIPTION TO THE STOCK.

Because, FIRST, any other construction would have allowed a subscription to be made by any county in the State, for the citizens of Wilkes County, by reason of vicinage, *had no other*

or greater interest "in the railroad than any other citizen of the State."

SECOND. According to all rules of construction, it must be assumed that the Legislature intended to describe a class of counties, and limit the power to them, since it is an established rule that the Courts must, if possible, give effect to all of the words of a statute, as the Supreme Court of North Carolina did; whereas, the Court of Appeals, in order to sustain the bonds, construed the word of limitation as mere surplusage.

THIRD. It is an historical fact, alluded to in Galloway v. Chatham Railroad Co., 63 N. C., 147, and University v. Holden, 63 N. C., that counties, as well as the State, had been lending their credit and subscribing to the stock of railroad companies, and that Sec. 14, Article II, and Sec. 7, Article VII, of the Constitution of 1868, had been inserted in that instrument to restrain counties from reckless expenditures of this kind, just as Secs. 1, 4, Article VI, had been framed as a check upon extravagant legislation by the State (see 63 N. C., page 147).

FOURTH. Sections 1996 to 2000 of The Code were first enacted by the reconstruction Legislature of 1868, which attempted to shape the statutory law so as to bring it into harmony with the Constitution, and it is in harmony with the general policy of the State to construe the restrictive clause of section 1996 as conferring the authority to subscribe on counties already interested pecuniarily in the railroad to which they propose to subscribe, just as the Legislature, in order to protect investments already made by the State, was empowered to subscribe to railroads in which the State had already become interested.

FIFTH. Section 3766 of The Code (enacted in 1868) provides that where statutes are re-enacted, "the portions not altered are to be considered as having been the law since their enactment; and at the time of their enactment." As is shown by the judicial history of the State, many counties, like Rutherford, had issued bonds in payment of subscriptions to the stock of railroad companies before the Constitution of 1868 was ratified, or the railroad was built across their borders (Hendricks v. Railroad, 101 N. C., 617), and it was the interest of such counties, as it was the policy of the State, to have power to protect such investments.

Neither The Code, sections 1996 to 2000, nor the charter, are sufficiently specific to comply with Article V, sections 6 and 7, of the Constitution.

In Commissioners of Buncombe County v. Payne (123 N. C., 432, 488, decided December 8, 1898, a month after the opinion was filed in Commissioners v. Call, on November 9, 1898, and during the same term), the Court said, at page 448:

"*A general act, authorizing any and all counties to issue bonds, would be invalid, especially when* (*as in the case here*) *it is necessary* to exceed the Constitutional limitation *to pay interest or principal.* Tate v. Commissioners, 122 N. C., 812 (at page 815); Herring v. Dixon, *Id.*, 420 (at page 124)."

In Commissioners of Wilkes v. Call, 123 N. C., 308 (at page 324), Justice Douglass said, in reference to the necessity for specific statutes:

"If the word 'uncompleted' can refer to any road not yet begun, and the word 'interest' apply to a mere friendly feeling or supposed advantage to be derived from the general building up of a country, then the several counties may go on *forever subscribing unlimited amounts to any railroad in esse or in future that may be located within the range of their knowledge. Such a construction would simply nullify the Constitution by making its explicit restrictions vain and worthless. It can not be adopted by us, but, if we were forced to adopt it, we would be equally forced to declare those sections null and void. If they mean that, they have no place upon the statute books.* While the Legislature may, in individual cases, grant to specific counties the necessary authority, in accordance with the provisions of the Constitution and subject to its restrictions, *it can not, by a sweeping act of unlimited application, utterly destroy its operation.* If the Legislature or the railroad company or the county had placed any such construction on those sections, additional legislation would have been deemed useless, and the recitals in the bonds would have been different."

. In short, the declaration of the State Court is, that the sections referred to, if susceptible of the construction placed upon them by the Circuit Court of Appeals, were in violation of the Constitution (referring, of course, to Article V, sections 6 and 7).

Article V, sections 6 and 7 are as follows:

"Sec. 6. *Taxes Levied by County Commissioners.*

"The taxes levied by the Commissioners of the several counties for county purposes shall be levied in like manner with the State taxes, and shall never exceed the double of the State tax, *except for a special purpose, and with the special approval of the General Assembly.*

"Sec. 7. *Acts Levying Taxes Shall State Object, etc.*

"Every act of the General Assembly levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other purpose."

There is no finding as a fact, in Commissioners v. Payne, *supra*, that the levy of a tax, sufficient to meet the interest "or principal" at maturity, would exceed the Constitutional limit (of sixty-six and two-third cents on the hundred dollars in value of property taxed). But the Court takes judicial cognizance of public law, and reports of the Auditor, as to the assessed value of property and the amount of taxes imposed. Upon this information, which is within the reach of every citizen who can read, as well as of the Court, the Court declared that it would be necessary to exceed the limit in order to pay interest and principal at maturity of the Buncombe debt.

For like reason, Justice Douglass said, in Commissioners v. Call (123 N. C., page 324), in condemning the construction of The Code now adopted by the Circuit Court of Appeals, which would allow all counties to subscribe "unlimited amounts to any railroad *in esse* or *in futuro*, that may be located within the range of *their knowledge*," said:

"Such a construction would simply nullify the Constitution *by making its explicit restrictions vain and worthless. It can not be adopted by us, but, if we were forced to adopt it, we would be equally forced to declare those sections null and void. If they mean that, they have no place upon the statute books."*

Judge Douglass was warranted in declaring, of his judicial knowledge, that it would be necessary for Wilkes County to exceed the Constitutional limit. Were we to concede the soundness of the position taken by the Court of Appeals, that it is not essential to levy a special tax "in the same bill," except

when the tax will exceed the limit, then our position would be tenable under even that rule.

The Construction Placed by Justices Clark and Douglass, Speaking for the Court in the Buncombe and Wilkes Cases, Upon the State Constitution, Finds Support in Older Adjudications of the State Court.

THE SETTLED LINE OF DECISIONS OF THE SUPREME COURT OF NORTH CAROLINA, PRIOR TO OCTOBER 1st, 1889, WHEN THE WILKES COUNTY BONDS WERE ISSUED, IS IN ACCORD WITH THE RULING IN COMMISSIONERS V. PAYNE, SUPRA, THAT A GENERAL ACT PURPORTING TO AUTHORIZE "ANY AND ALL COUNTIES TO ISSUE BONDS WOULD BE INVALID BECAUSE OF FAILURE TO PROVIDE FOR LEVYING A SPECIAL TAX."

In Galloway v. Chatham Railroad Company, 63 N. C. R., 151, 152 (decided at January Term, 1869), the Court held that there were two conditions upon which the State should be allowed to contract a new debt before the bonds of the State should be at par (under a fair interpretation of Article IV, Sec. 5, of the Constitution).

1st. Unless it (the Legislature) shall, in the same bill, levy a special tax to pay the interest annually, and,

2d. "Unless the subject be submitted to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon."

The Court held in that case that the meaning of the section is that "The General Assembly shall have no power to create new debt or pecuniary obligation (except in two specified cases), unless *a special tax be levied in the same bill to pay the interest.*"

Thirty years later, Justice Clark, delivering the opinion of the Court in Commissioners v. Payne, 123 N. C., at page 488, construed sections 6 and 7 of Article V of the Constitution of North Carolina, which is as follows:

"Section 7.—Every act of the General Assembly levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other."

In connection with the prohibition in section 6 of Article V, that the tax levied by the counties "shall never exceed the double of the State tax, except for a special purpose, and with the special approval of the General Assembly."

Judge Clark declared, for the Court, that neither the general provision of The Code, Sec. 1999, nor the general provision of the charter of the Northwestern North Carolina Railroad Company, construed in connection with that of the Atlantic and North Carolina Railroad Company, was sufficiently specified to confer authority on Wilkes County to subscribe or issue the bonds, or levy the tax to meet the principal and interest of the bonds.

The provisions of The Code and of the charter referred to are as follows:

"Sec. 1996. The Boards of Commissioners of the several counties shall have power to subscribe stock to any railroad company or companies, when *necessary to aid in the completion of any railroad in which the citizens of the county may have an interest.*"

"Sec. 1999. In case the county shall subscribe the amount proposed in bonds, the Board of Commissioners shall have power to fix the rate of interest, not to exceed the rate of eight per cent, when the interest on said bonds shall be payable, and at what place, and shall also fix the time and place of paying the interest, and shall also determine the mode and manner of the same; and also to raise by taxation, from year to year, the amount necessary to meet the interest on said bonds."

"Sec. 2000. The taxes authorized by the three preceding sections to be raised for the payment of interest or principal, shall be collected by the Sheriff in like manner as to other State taxes, and be paid into the hands of the County Treasurer, to be used by the Chairman of the Board of County Commissioners as directed by this chapter."

SECTION 12 OF THE CHARTER (PAGE 54 OF PRINTED RECORD), SECTIONS 33 AND 36 OF THE CHARTER OF THE ATLANTIC AND NORTH CAROLINA RAILROAD (PAGES 54 AND 55 OF THE PRINTED RECORD).

"Sec. 12. Be it further ordained, that the stockholders of said company may pay the stock subscribed by them either in money, labor, material for constructing said road, as the board of directors may determine, and that *all counties or towns subscribing stock to said company shall do so* in the same manner and under the same rules and regulations and restrictions as *are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company, for the government of such towns and counties as are now allowed to subscribe to the capital stock of said company.*"

Chapter 136 of the Laws of North Carolina, session 1852.

"Sec. 33. Be it further enacted, that it shall be lawful for any incorporated town or county near or through which said railroad may pass to subscribe for such an amount of stock in said company as they shall be authorized to do by the inhabitants of said town or the citizens of said county, in *manner and form as hereinafter provided.*"

"Sec. 36. Be it further enacted, that for the purpose of paying the quotas on said stock as may be called for, or the installments of such subscriptions as may fall due, the town authorities and the Justices of the county shall have power to appoint an agent or agents to negotiate a loan or loans for and in the name of such town and county; and it shall be the duty of the authorities of such town and the Justices of such county to levy such taxes annually on the persons, lands and other personal property within such town and county as may be sufficient to pay the amount of such loan or loans and the interest thereon, and as said town authorities and Justices of such county shall deem necessary and proper, and to make such order or orders as shall be deemed necessary for the due collection and payment of the same; and the stock subscribed on behalf of such town and county shall stand pledged for the payment of the loan thus authorized to be contracted."

The Constitution of North Carolina provides as follows:

"Article II, Sec. 21.—The style of the acts shall be: *The General Assembly of North Carolina do enact.*"

The Supreme Court of North Carolina, in State v. Patterson, 98 N. C., 660, 661, 662, 665, 666 (decided September, 1887,

two years before the bonds were issued), held that a statute in all other respects in the form prescribed, but without the prescribed enacting clause, was void.

The Court declared all of the requirements of the Constitution to be mandatory, using, at pages 661, 662, the following language:

"It (the Constitution) is not to be disregarded, ignored or suspended, or broken, in whole or in part, nor can any officer, or a co-ordinate branch of the government, supply, superadd or assume power and authority not conferred by it. In this latter respect, it expressly provides that "all powers not herein delegated remain with the people.

"More particularly, for the present purpose, when the Constitution prescribes and directs in terms, or by necessary implication, that *a particular power shall be exercised in a specified way, or a particular thing shall be done by a particular co-ordinate branch of government—as the Legislature—or by a particular officer or class of officers, and prescribes the way and manner of doing it, such direction can not be disregarded; a due observance of it is essential, because the Constitution so provides, and its provisions are not in vain or of trifling moment. It is not of the nature of constitutions of government to provide non-essentials—useless, unimportant details—such as may be disregarded and dispensed with.* As we have said, they are organic —made upon solemn consideration by the sovereign authority, and contain general, essential provisions—details are avoided, unless deemed important—essential.

"The answer to these and like questions must be, that requirements of the Constitution shall prevail and be observed; and when it prescribes that a particular act or thing shall be done in a way and manner specified, such direction must be treated as a command, and an observance of it essential to the effectiveness of the act or thing to be done. Such act can not be complete—such a thing is not effectual—until done in the way and manner so prescribed." Wilkes County Commissioners v. Coler, 180 U. S., 506, 521.

Justice Clark, in Commissioners v. Payne, 123 N. C., at page 488, construed the command contained in the latter half

of section 6, and in section 7, of the Constitution according to the rule laid down in State v. Patterson, supra, two years before the bonds were issued in 1889, to-wit, in September Term, 1887. Justice Douglas followed the same rule when he declared that the provisions of the charter and the sections of The Code had no place on the statute book, if susceptible of the interpretation that they gave the same general authority to other counties as was given to Forsyth County.

By reference to Bank v. Commissioners, 116 N. C., 339, and Bank v. Commissioners, 119 N. C., 214, it becomes apparent that the Court of Appeals drew an inference from the two opinions that was unwarranted. The controversy was as to the validity of a subscription by the town of Oxford to a railroad company, which was chartered to build a railroad connecting the town of Oxford with the Coast Line, just as the ordinance of 1868 authorized the connection of Winston-Salem, in Forsyth County, intersecting by a line with the North Carolina road somewhere from Greensboro to Lexington. The town of Oxford was designated as the initial point of the proposed road, and the sufficiency of the authority was questioned in the first case (see 116 N. C., 363), because the Legislature had failed to provide in the charter itself the machinery for holding the election, and the Court decided that the general acts providing for holding such elections furnished the necessary authority as to the manner of holding them and counting votes. But it was not till the question was raised on the second appeal (119 N. C., 214), that the Supreme Court of North Carolina ever considered whether the authority to create the debt, *even with the approval of the voters of the town*, had been granted by the Legislature, and, then, apart from the question of estoppel, the discussion, on the argument and in the opinion of the Court, was directed to the new evidence showing that the statute relied on as authority for issuing the bonds was not enacted in accordance with the requirements of Article II, Sec. 14, of the Constitution.

It is a significant fact that the Act of 1868 (Code, Secs. 1996 to 2000), was not referred to by Justice Bynum in the opinion in Belo v. Commissioners, nor by counsel in the argument of that case, though the action was brought by Mr. McCorkle, former

Reporter and one of the ablest lawyers in the State, and though the case was decided eight years after the passage of the act of 1868-'9.

THE CASES OF HERRING V. DIXON, 122 N. C., 420, AND TATE V. COMMISSIONERS, 122 N. C., 812, SUSTAINED JUDGE CLARK'S POSITION AS TO THE INSUFFICIENCY OF STATUTES PURPORTING TO CONFER GENERAL AUTHORITY ON COUNTIES TO CREATE DEBTS, EXCEPT FOR NECESSARY EXPENSES.

It will be observed that the act construed in Herring v. Dixon, *supra*, conferred certain powers on three counties specifically named in the act, to-wit, Green, Wilson and Wayne, and that the statute construed in Tate v. Commissioners, *supra*, named Haywood County as the donee of certain power.

No Power to Wilkes County is Written in the Charter by the Reference to the Other Charter, Because:

1st. It is a familiar and elementary rule of construction that grants of powers to municipal corporations by a sovereign State are construed strictly, both as to the designation of the donees of the powers, and the nature and extent of the authority granted.

2d. It is not pretended that there is any grant of power in the charter itself to any county to subscribe, except that contained in section 12, *supra*, to-wit, *"all counties or towns subscribing stock to said company, shall do so in the same manner* and under the same rules, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company, for the government of such towns and counties *as are now allowed to subscribe to the capital stock of said company."* This designates no county, either by name *or "writing into"* the sections referred to. The counties that do subscribe under the ordinance of 1868 must "do so in the same manner and under the same rules and regulations and restrictions as are prescribed" in the other charter. The provisions of Chapter 136, Laws of 1852, *"are written into" the ordinance for the purpose of furnishing a method of proceeding in submitting the question of subscription to the people and making a subscription after voting.*

3d. It is a forced construction which interprets a reference to the "rules, regulations and restrictions" imposed in another charter "for the government of such towns and counties as are allowed to subscribe to the capital stock of said company, as a grant of power to all such counties as lie near the line of the new company, because "all counties near or through which" the line of the older company passed were permitted by express grant of form to subscribe to the company building it. This is a claim that the power to subscribe is given to Wilkes County by implication, arising out of the charter. Judge Douglas, in Commissioners v. Call, 123 N. C., at page 316, meets that suggestion as follows:

"But corporate powers can never be *created by implication nor extended by construction.* No privilege is granted unless it be expressed in plain and unequivocal words, testifying the intention of the Legislature in manner too plain to be misunderstood. When the State means to clothe a corporate body with a portion of her sovereignty, and to disarm herself to that extent of powers which belong to her, it is so easy to say that we will never believe it to be meant when it is not said; and words of unequivocal import are so easily inserted by mistake or fraud, that every consideration of justice and policy requires that they should be treated as nugatory, when they find their way into the enactments of the Legislature. In the construction of a charter, to be in doubt is to be resolved; and every resolution which springs from doubt is against the corporation. This is the rule sustained by all the Courts in this country and in England. No other has ever received the sanction of any authority to which we owe much deference. This Court has asserted it times without number. We have ruled five or six important cases upon it within the last year. We seem not to have made much impression on the professional mind, and we are probably making little now. But when respectable counsel call upon us hereafter (as they doubtless will) to enlarge corporate powers by construction, we can only repeat again and again that our duty imperatively forbids it. The privileges of the Pennsylvania Railroad Company may be too rigidly restricted. If the usefulness of the company would be increased by extending

them, let the Legislature see to it. But let it be remembered that *nothing but plain English words will do it.*"

In Belo v. Commissioners (upon which the Court of Appeals rests its decision) we find (76 N. C., at page 493) the following:

"This rule, however, which subsists between individuals, is much modified in respect to *corporate bonds, such bonds can be issued only in pursuance of a special grant of power*, and the party claiming the benefit of such bonds must show power in the corporation to issue them."

4th. The Court, in Call v. Commissioners, *supra*, at page 313, in discussing the effect of Sec. 12, said:

"That said ordinance can not be relied on to support the validity of the bonds at issue is apparent for several reasons: *First, we do not see that any authority whatever was given or attempted to be given by either of these sections to Wilkes County to subscribe to the capital stock of this company.*"

5th. The fact can not be ignored that the Court was influenced in Belo v. Commissioners (76 N. C., at pages 497, 498) by the expressed view that the act of August, 1868, "validated both the county subscriptions and the issue of bonds," as will appear from the following (see page 496):

"Declaring, as we do, that the ratifying act of August, 1868, was a curative act, and validated both the county subscription and the issue of the bonds, if any defects existed therein—and it has been one purpose of this opinion to show that the bonds were valid in the hands of *bona fide* holders without the aid of this healing act—*the proposed evidence of the defendant became immaterial and irrelevant.* As a matter of law, the bonds were valid, and the Court did not err in so declaring."

It is significant that "*the proposed evidence of the defendant became immaterial*" *only in view of the ruling that the curative act of August, 1868, validated the subscription and bonds* (see extract). *It nowhere appears what the evidence was, but there can be no question that the defendant, Forsyth County, offered evidence which, but for the curative act, would have been material. The act of 1868 was then treated as a valid act.* Now, in the light of the evidence adduced, the Supreme Court of the United States has held that it is no law. The material evidence excluded,

because immaterial on account of the treating the act of 1868 as valid, might have turned the scales, as it would have gone to the jury upon the issue submitted. It is important to recollect that, just after the declaration by the Court (Belo v. Commissioners, 76 N. C., page 498), that *"the proposed evidence of the defendant became immaterial and irrelevant"* in view of the fact that the curative act validated the bonds, the Court proceeds, as pertinent to that part of the discussion, to make the following statement:

"The only issue submitted to the jury was, 'Is the plaintiff the *bona fide* owner and for value of the bonds and coupons mentioned in the pleadings, and was he such at the commencement of the action?'"

The Court below excluded the testimony offered by the defendant bearing upon the validity of the bonds, announcing as "a matter of law that the bonds were valid," and refused to submit any issue as to the validity, and the Supreme Court sustained this ruling, because the validity of a curative act, which, in the light of the evidence offered in this case, is no law, was not then questioned. (See 76 N. C., page 498.) Wilkes County v. Coler, 180 N. C., 506, 521. (See opinion, printed record, page 112.)

IT MUST BE REMEMBERED THAT THE ACT OF 1868 WAS RATIFIED AUGUST 11, AFTER THE RATIFICATION OF THE CONSTITUTION ON APRIL 24, 1868, IF THE SUPPOSITION THAT THE ACT OF 1868 WAS VALID, RENDERED IRRELEVANT AND INCOMPETENT TESTIMONY WHICH WOULD HAVE BEEN MATERIAL IN BELO V. COMMISSIONERS, SUPRA, IT FOLLOWS THAT THE ORDINANCE OF 1868, *ALONE*, DID NOT INVEST WILKES COUNTY WITH AUTHORITY TO SUBSCRIBE TO THE STOCK OF THE COMPANY, AND ISSUE BONDS IN PAYMENT OF SUCH SUBSCRIPTION.

See Questions Asked by the Court (Wilkes County Commissioners v. Coler, 180 U. S., 532):

"WAS WILKES COUNTY IN THE SAME CATEGORY WITH FORSYTH COUNTY? WAS THE ROUTE OF THE ROAD NORTHWEST OF SALEM AND WINSTON TO SOME POINT IN THE NORTHWESTERN BOUNDARY LINE OF THE STATE TO BE DETERMINED BY THE LEGISLATURE OR BY THE COMPANY? IF BY THE LEGISLATURE, WAS THE ROUTE EVER DETERMINED OTHERWISE THAN BY THE ACT OF 1879, WHICH HAS BEEN ADJUDGED NEVER TO HAVE BECOME A LAW OF THE STATE?

"DID WILKES COUNTY HAVE AUTHORITY UNDER THE ORDINANCE OF 1868, ALONE, TO AID BY A SUBSCRIPTION OF STOCK AND BONDS THE CONSTRUCTION OF THE SECOND DIVISION OF THE ROAD REFERRED TO IN THE ACT OF 1879, EXTENDING FROM THE TOWNS OF WINSTON AND SALEM, UP THE VALLEY OF THE YADKIN BY WAY OF JONESVILLE AND WILKESBORO, IN THE COUNTY OF WILKES, TO PATTERSON'S FACTORY IN THE COUNTY OF CALDWELL?"

Wilkes County Commissioners v. Coler, 180 U. S., at page 532.

Referring to the act of February, 1879 (printed record, pages 14 to 16), the Circuit Court of Appeals said, in the leading opinion (printed record, page 116):

"The act of February 20, 1879, which is recited in the bonds as authority for issuing them, definitely located this road running into Wilkes County. It does it by enacting that the Convention ordinance shall be amended by adding certain words, which make it read, when so amended, as follows (see section as amended, page 115).

Section 2 of the act of February 20, 1879, provides for convict labor being furnished for the purpose of constructing this second division; and section 4 provides *for bond subscriptions by any county in the State*. This act was invalid so far as it attempted to give power to the counties to create a debt, because it was not passed as laws for that purpose are required by the Constitution of North Carolina to be passed, but that invalidity

does not affect the sections of the law which deal with other matters.

Rodman v. Washington, 122 N. C., 39 to 42.
Russell v. Ayers, 180—189.
Gambell v. McCrady, 75 N. C., 509.
Bank v. Commissioners, 119 N. C., 214.

So far as now appears, the amendment locating the road into Wilkes County, *was validly passed and became a valid law of North Carolina."*

The position upon which the Court thus rests its opinion may be summarized as follows: The act of February 20, 1879, is unconstitutional, because not passed in accordance with the requirements of Article 2, Sec. 14, of the Constitution, in so far *as it attempts directly and in express language to authorize Wilkes County to issue bonds* in payment of its subscription. But though the direct authority purporting to be given is void, Judge Morris held that *the other provisions enacted in the same defective way, accomplished by indirection the same end by simply locating a new branch of an old road.*

This proposition, if sustained as correct, effectually annuls Section 14, Art. II, of the Constitution, the interpretation of which, by the State Court, has been declared binding upon the Supreme Court of the United States. Almost every old charter which authorized the building of a railroad before 1868, also in terms authorized the construction of branch roads, and this ruling of the Circuit Court of Appeals would sanction any evasion of this plain prohibition of the Constitution by amendments to them enacted without a roll-call, provided such amendments purported to modify the general description of the route marked out in the charter by adding a more specific description of a branch. This would be to follow the State's interpretation only far enough to provide ready means of evading it. The Court cites several North Carolina cases to sustain this extraordinary conclusion. These decisions sustain the well-established principle that an act may be constitutional in part and unconstitutional in part, but we search in vain for sanction to the proposition that one part of an act may be void as authority to create a debt, *because of the defective enactment of the whole act while another section of the*

act so passed confers authority on a municipal corporation to create the same debt.

It is true that in Rodman v. Washington the Court held the Act of 1897 for the support of graded schools in Washington "unconstitutional and void, in so far as the same purports to authorize and empower the Commissioners of the town of Washington to levy a tax for any such purpose as therein set out, "for that the said bill was never read three several times in each House of the General Assembly," etc. But we search the opinion in vain for a ruling that some other provision of the same act enabled the town to evade the constitutional inhibition.

In Russell v. Ayer, 120 N. C., 180, the Court held that the section of the Revenue Act of 1897, which was in violation of Art. V, Sec. 1, of the Constitution, in that it failed to observe the equation between property and polls, was void, and that the effect of this violation of the Constitution was to leave in force the ratio between poll and property established by the statute in force when the act of 1897 was ratified, though the other provisions of the act of 1897 not in violation of the Constitution must be enforced as valid. But we find in the opinion no intimation that this plain violation of the organic law could have been evaded by an artful draftsman. We find nothing in Bank v. Commissioners, 119 N. C., 214, to warrant the deduction that an act, invalid because of the manner of its enactment, in so far as it purports to confer authority upon a corporation by its expressed language, can be construed to confer the same authority by some reference in another section of an older statute.

The case of Gambell v. McCrady, 75 N. C., 509, sustains the general proposition that an act may be constitutional in part and may be unconstitutional in part, but nowhere lends its sanction to such an evasion of the organic law as seems to be approved by the Circuit Court of Appeals.

IF THE LEGISLATURE ALONE HAD THE POWER TO LOCATE THE LINE OR LINES TO BE CONSTRUCTED WEST OF WINSTON-SALEM, AND SUCH LOCATION, BY VIRTUE OF A SIMPLE ENACTMENT, WAS TO BE CONSTRUED AS AUTHORITY TO A

COUNTY TO CREATE A DEBT, THEN SUCH A STATUTE WAS IN VIOLATION OF ARTICLE II, SECTION 14, OF THE CONSTITUTION, AND VOID, IF NOT ENACTED AS THEREIN REQUIRED. THE LEGISLATURE CAN NOT DO INDIRECTLY WHAT IT IS PROHIBITED FROM DOING DIRECTLY. THE CIRCUIT COURT OF APPEALS FAILED TO ADVERT TO VARIOUS AMENDMENTS TO THE CHARTER OF 1868, WHICH ARE REFERRED TO IN THE RECORD. AMONG THE ACTS SO OVERLOOKED IS THE ACT RATIFIED FEBRUARY 3, 1869 (ACTS OF 1868-'69, CHAPTER 62), ENTITLED "AN ACT TO REPEAL AN ACT ENTITLED AN ACT TO AMEND AN ORDINANCE OF THE CONVENTION ENTITLED AN ORDINANCE TO INCORPORATE THE NORTHWESTERN NORTH CAROLINA RAILROAD COMPANY, AND TO SUBSTITUTE THE FOLLOWING PROVISIONS FOR SAID ACT."

The second section of the last-named act provided for State aid to the first division of the road from Winston-Salem, for the Mount Airy division, and "for the purpose of aiding in the construction of the Yadkin Valley division of said railroad, running from Salem-Winston, by way of Louisville, thence by way of Yadkinville, in the county of Yadkin, or within one and a half miles thereof." By this act it was provided that the State should loan the company twenty thousand dollars a mile to construct the road by way of Yadkinville. This act has never been repealed in so far as it provides for a different route from Salem-Winston, westward. Some of the other acts referred to in the record, and printed in the brief of counsel for appellant in the Circuit Court of Appeals, are the following, to-wit:

Acts of 1869-'70, Chapter 100.
Acts of 1870-'71, Chapter 178.
Acts of 1871-'72, Chapter 25.
Acts of 1871-'72, Chapter 47.

The Circuit Court of Appeals Failed to Examine Thoroughly the Decisions of the Supreme Court of North Carolina, as Will

Appear from Comparing Extracts from its Opinion with the Decisions of the State Court.

First, the Circuit Court of Appeals said in the opinion (record, page 117):

"Has the Supreme Court of North Carolina ever interpreted this amendment and declared its meaning? We do not find that it has."

In Commissioners v. Call, the majority opinion does not place the decision upon the contention that Wilkes County is not in the same category with Forsyth County, but upon a want of power affecting both alike, and upon the fact that an invalid enactment is recited on the face of the Wilkes County bonds as authority to issue them."

Compare the foregoing with the following, from Commissioners vs. Call, 123 N. C., at page 313:

"That said ordinance can not be relied on to support the validity of the bonds at issue is apparent for several reasons. *First, we do not see that any authority whatever is given, or attempted to be given, in either of these sections, to Wilkes County to subscribe to the capital stock of this company.*"

It thus appears that the State Court rested its opinion, first of all, upon the ground, *that no power was given to Wilkes County, not upon a want of power affecting Wilkes and Forsyth alike,* though it is true that the testimony offered by the defendant in the Belo case was excluded, and the Supreme Court of North Carolina sustained the ruling below, *because the Act of August 11, 1868* (which, in the light of new evidence—extracts from the Legislative Journals—has been since declared void), *rendered that evidence irrelevent and immaterial.* The Supreme Court, in the extract given above, laid down at the outset the proposition, that no authority had been granted to Wilkes County, not that both counties are in the same category. Thus the Court of Appeals misinterprets, and, by inadvertence, mistakes the grounds upon which the opinion (in Commissioners v. Call) is made to rest.

Second, the opinion of the majority of the Circuit Court of Appeals, in further support of the views, that the Act of February 20, 1879, vested authority in Wilkes County, said:

"The original charter ordinance of 1868, having given authority to construct a railroad by way of Salem and Winston, in Forsyth County, to some point on the northwestern boundary line of the State, and to construct branches, and the Legislature having afterwards validly enacted, that one of these branches running towards the northwestern boundry line of the State, to be called the second division, should be constructed by way of Wilkes County, there would seem no sound reason for construing the legislation so as to deny to Wilkes County that power to issue bonds which the Supreme Court of North Carolina had in 1877 held that Forsyth County had."

As I have already attempted to show, the Legislature could not evade the Constitution by giving indirectly to a county power to create a debt, when it was prohibited by Art. II, Sec. 14, from doing so directly. *To declare the amendment of 1879, so far valid as to vest Wilkes County with authority to create a debt by marking out the route of the second division in Section 1 of the act, though Section 4* (printed record, pages 14-15) is to annul the Constitution and evade the decisions of the highest Courts, State and Federal Courts.

Third, the Circuit Court of Appeals said in effect, that there is nothing in the decisions of the Supreme Court of the State to sustain the late statement of that Court, that it was the policy of the framers of the Constitution of 1868 and of the Legislature, which gave its provisions full effect, to restrict counties and other municipal corporations in creating debts. That Court said:

"It is urged in argument that the policy of North Carolina was declared by the Constitution of 1868 to be hostile to permitting counties to bond themselves in order to subscribe to railroads which passed near or through them. We do not think this anywhere appears."

In discussing The Code, Secs. 1996 to 2000, in Commissioners v. Snuggs, 121 N. C., at page 402, Justice Montgomery said, for the Court:

"*It is most reasonable to conclude that the policy and purpose of both the constitutional provision and the statute were the same, the only difference being that in case of State aid no ap-*

proval by a vote of the people was required, while a majority vote of the people was required in case of county aid. The object of the statute must have been to provide by a *general act means by which the counties, without special* legislation for each county by separate bills, might be *enabled to complete unfinished railroads in which the counties had a pecuniary interest.* At the time of the enactment of the statute 1868-'69, and always since that time, any county of the State, duly observing the limitations of Section 7, Art. VII, of the Constitution, and under an act passed according to the requirements of Section 14, Art. II, of the Constitution, could and can subscribe to the capital stock of a railroad company, whether unfinished or to be begun.

In support of the declaration of the Court, which the Circuit Court of Appeals say, "We do not think anywhere appears," we respectfully submit a portion of the opinion of Chief Justice Pearson, in University vs. Holden, 63 N. C. (filed at June Term, 1869), beginning at page 413:

"The evil which the Constitution seeks to prevent is not that of giving aid to individuals or corporations in the construction of railroads, but that of contracting *new* debts on the part of the State, the existing debts being almost too heavy to bear, and the credit of the State tottering under the load. A construction by which new debts may be contracted on a larger scale than one expressly prohibited, is not admissible upon any principle of the law. As this is a deduction from Galloway v. Jenkins, in which the Court was divided, *I will put my conclusions also on the construction of all the provisions of Art. V.*

III. The act under consideration is in violation of the Constitution in this: The tax levied by it disturbs the proportion which, by the Constitution, capitation tax must bear to the tax on the value of the property, to-wit: "The *tax on a poll should be equal to the tax on three hundred dollars worth of property.*" Here we have the proportion. Then follows a provision: "The State and county tax combined shall never exceed *two dollars on the head,*" and the necessary effect is, that the State and county tax on the value of property shall never exceed two dollars on three hundred dollars worth of property; and the effect also is that if the tax on a poll is less than two dollars, then the tax on

three hundred dollars worth of property must be less in the same ratio. In other words, the tax on the poll is "the standard" by which the tax on property is levied.

Under two dollars, the power to levy a poll tax for State purposes is unlimited; this interest needs no protection, for it has a full representation in the General Assembly.

Counties are protected by Section 7, which provides: "Taxes levied for county purposes shall be levied in like manner with the State taxes, and shall never exceed double of the State tax, except for a special purpose, and *with the special approval of the General Assembly.*"

Cities, towns and townships are protected by Art. VII, Sec. 7, which provides: "No debt shall be contracted, nor shall any tax be levied, except for necessary expenses, unless by a vote of a majority of the qualified voters therein."

The only remaining interest is that of *property holders, in respect* to State and county taxes. This interest is protected by the equation fixed between capitation tax and the tax on property. A statute which disturbs this equation breaks down the safeguard thrown around property by the Constitution. If it can be done to the extent of one-hundredth on one per cent, it may be done to the extent of one-tenth and there is no limit.

It was said in the argument, that this equation applies only to taxes levied for current expenses of the State and counties, and has no reference to taxation necessary to pay interest on the public debt, or the tax to be levied to pay the interest on any new debt.

1. I agree that if, under this equation, carried to its limits, the amount is not enough to meet current expenses, and, also, to pay interest on the public debt, then, for the excess needed, it is not only within the power, but it is the duty of the General Assembly to disregard the equation, for this protection to property must be taken to be subject in the injunction, "to maintain the honor and good faith of the State untarnished in regard to the public debt (Art. I, Sec. 6), and by Section 4 of the Article under consideration, it is ordained: "The General Assembly shall, *by appropriate legislation and adequate taxation,* provide for the payment of the interest on the public debt, and after 1880 it

shall lay a special annual tax, as a sinking fund, to discharge the principal." I do not adopt the entire position taken by Mr. Haywood, that a specific tax is meant as a tax on land by the act, or on horses and cattle by the head. It is enough to admit that this tax is to be independent of the equation; as in *Sec. 7, a tax for special county purposes, with the special approval of the General Assembly, may be levied without reference to the equation.*

I do not agree to the position, that the tax required by Art. . ., Sec. 5, to be levied to pay the interest on any new debt, is not subject to equation; and that the powers to tax property *in reference to new debts are unlimited*, save by the discretion of the General Assembly. There is nothing, as we have seen there is, in the case in regard to taxation to meet the interest and principal of the existing debt, to take this taxation out of the equation. *Its being called a special tax can not have the effect, for Section 6 requires that every act shall state the special object to which the tax is applied. On the contrary it is included in the equation by every rule of construction.*

This fixed equation between poll tax and property tax gives significance to the provisions of the first clause of Section 5: "No new debt shall be contracted in behalf of the State, *unless in the same bill a special tax is levied to pay the interest annually.*"

Compare the foregoing with the discussion in the same volume in Galloway vs. Chatham Railroad Company, to which Chief Justice Pearson refers in the foregoing citation from University v. Holder, and it will appear that the Court, in the two opinions, for the purpose of construction, discussed the provisions of Art. V of the Constitution, and the question whether these provisions restricted the State or its governmental subdivisions.

In matters of construction, the Court is not to confine itself to the particular section; but it is to consider the entire instrument, in order to find the general purpose and the object arrived at.

"To maintain the honor and good faith of the State untarnished, the public debt regularly contracted before and since the rebellion shall be regarded as inviolable, and never to be questioned." Art. I, Sec. 6.

"No law shall be passed to raise money on the credit of the State, or to pledge the faith of the State directly or indirectly for the payment of any debt, etc., unless the bill is *read three times on three different days*, and unless the *yeas and nays on the second and third readings of the bill shall have been entered on the Journal.*" Art. II, Sec. 16.

"*The General Assembly shall, by appropriate legislation, and by adequate taxation, provide for the prompt and regular payment of the interest on the public debt, and, after the year 1880, it shall lay a specific annual tax upon the real and personal property of the State, and the sum thus realized shall be set apart as a sinking fund, to be devoted to the payment of the public debt.*" Art. V, Sec. 4.

But the Court is also required to look at the previous legislation by which the evil, calling for these cumulative restrictions was caused, and this will furnish a key to the meaning, and open it so plainly to view, "that he who runs may read."

The war debt has been put out of the way by a dash of the pen. It will be found that most of the public debt was incurred in three modes: *First, by subscribing for stock in railroad and navigation companies, and issuing bonds to pay for the stock, the State becoming a member of the corporation; this is the heaviest item, and amounts to, say eight millions of dollars; second, by issuing bonds of the State, and exchanging such bonds for a like amount of bonds of the corporation, the State not becoming a stockholder, and taking a collateral security of more or less value —this is the next heaviest item, and amounts to about three millions of dollars; third, by endorsing the bonds to corporation and taking a mortgage on some other collateral security—this amounts to about two millions.*

It is a part of the judicial history of the State, that the counties had been subscribing to the capital stock of railroad companies, and hence the provisions of the Constitution, Art. II, Sec. 14; Art. V, Secs. 1, 6, 7; Art. VII, Sec. 7, and of the Act of 1868 (Code, Secs. 1996 to 2000), which left counties, like the State, at liberty, by a general provision of law to protect investments made before 1868, but subject to restrictions similar to those imposed on the State as to incurring other obligations.

Did not the citizen need even greater restrictions to protect him against municipal than State legislation?

Galloway vs. Chatham Railroad Company, 63 N. C., pages 152, 153, 154.

By comparing the citation given above, it will appear that for thirty years the Supreme Court of the State has been declaring that the lawmakers of 1868 intended to restrict the legislation of municipalities, as well as the General Assembly, so that neither could lend its credit without the approval of the voters interested, except to finish a railroad in which it had invested before April 24, 1878.

THE ORDINANCE OF 1868 DID NOT PLACE WILKES AND FORSYTH IN THE SAME CATEGORY.

Though the Supreme Court had, in Wilkes County Commissioners v. Coler, 180 U. S., at page 532, mentioned the Act of 1879, as a statute, *"which has been adjudged never to have become a law of the State,"* drawing the deduction, that such a law could confer by a power, which its direct provisions were ineffectual to grant.

In opening the discussion as to the general authority granted by the ordinance of 1868, Judge Morris, speaking for the majority of the Court, said:

"The question now to be passed upon, therefore, is whether, independent of the invalid legislative *enactment attempted to be passed subsequent to the Convention Ordinance of March 9, 1868, Wilkes County had the power under the ordinance to submit the stock subscription to the vote of the qualified voters, and upon authorization by a majority of the votes to issue the bonds and levy taxes to pay the interest and principal.* If Wilkes County was in the same category with Forsyth County, the Supreme Court of North Carolina adjudged in the case of Belo v. Commissioners, 76 N. C., 489 (1877), that the power was conferred by the ordinance of the convention, and this ruling remained unaffected by any subsequent adjudication of the Supreme Court of North Carolina, and until these bonds were issued."

The argument of the Court to which we have adverted shows that *"the invalid legislative enactment attempted to be passed subsequent to the Convention Ordinance of March 9th,* 1868," seems to have been an after thought, as in the foregoing extract it seemed to be justly conceded that the act of 1879 was not a law that could confer any authority on the county of Wilkes.

The first section of the Ordinance of 1868 made *"Salem and Winston, in Forsyth County," the only fixed and certain point on the proposed road, and Forsyth County* was the only county through which the ordinance required the proposed road to be built (record, page 10).

Section 13 provided that the company should have power to construct branches of said road, one of which shall run from the towns of Winston-Salem, by way of Mount Airy, in Surry County, to line of the State of Virginia (record, page 13).

Leaving out of view the "legislative enactment attempted to be passed"—the Act of 1879—*Wilkes County was left by the charter in the same category, not with Forsyth (in which the initial point of the main line is located by the charter), but with every county in the State other than Forsyth.*

If the charter conferred this authority on Wilkes County, it would follow that the company might have projected branches from any point in the main line; for instance, Greensboro, or Winston-Salem, or any intermediate point thereon, to any point of the Atlantic coast, or on the boarders of either Virginia, Tennessee or South Carolina; and by virtue of locating such line, the act of the company, not of the Legislature, would vest authority not only in every county *"through which,"* but in every county "near which" such line would pass.

The Supreme Court of North Carolina had, by a line of decisions running back for about a century before the bonds were issued, held that the word "near" was too indefinite to fix and determine location. Applying the principle, that Court had adjudged that a call for a stake, an indefinite point, in a known line, by a certain course, should be extended beyond the distance given so as to intersect with such line, while if the same call had been for a stake *"near"* such line, it should not be run or ex-

tended beyond the distance called for, because the word *"near"* designated no particular point.

Cansler v. Fife, 50 N. C. (5th Jones), 424, 427.
Mizzell v. Simmons, 79 N. C., 182.

In Cansler v. Fife (50 N. C., at pages 427, 428) the Court said:

"In respect to the question as to Rickman's line, we also concur with his Honor. There was no evidence by which the jury could locate that line; supposing it to have been located, *the call for a Spanish oak, in or near* Rickman's line, *would not control course and distance*, because the Spanish oak could not be found, *and the word "near" is not sufficiently certain. How near? One pole or fifty? Either would satisfy the term "near."*

"Harvy v. Goodman, 1 Dev. and Bat. Rep., 76."

In attempting to show that the line, *which is called a branch in the void Act of 1879*, is built as the second division, leaving out of view said void act, the Court (at page 116 of the record) said:

"The piece of railroad for which the bonds in suit were issued does run from Salem and Winston, in the general direction of the northwestern boundary line of the State, and, indeed, *it seems evident that such a railroad, to some point in the northwestern boundary line of the State, must pass near or through Wilkes County."*

Construing the ordinance *"alone,"* the Court, in order to sustain the validity of the bonds, was driven to the necessity of holding as a matter of judicial knowledge, that a line through an adjacent county to Wilkes would be within the meaning of the ordinance (the charter) near to Wilkes County. "How near; one mile or fifty?" (50 N. C., page 428). Yet the law of North Carolina, before 1868, in October, 1889, was, that a jury must be instructed that the word "near" was too indefinite to determine location. Yet, the Court, in Wilkes County Commissioners v. Coler, 180, 506, 531, said:

"It is settled doctrine of this Court 'that the question arising in a suit in a Federal Court of the power of municipal corpora-

tions to make municipal securities,' is *to be determined* by the law, as judicially declared by the highest Court of the State, when the securities were issued, and that the rights and obligations of the parties accruing under such a state of the law, would not be affected by a different course of judicial decision subsequently rendered any more than by subsequent legislation."

"*When the securities were issued*" (*in October, 1889*) "the law of the State, as judicially declared by the highest Court of the State" for a century, was, that the word "near" was too indefinite, as a descriptive term, to fix and determine location, and consequently that the Court could not say judicially, nor allow a jury to determine, that near a county means in an adjacent county, or in a county between which and Wilkes there was only one county intervening.

Apparently doubting whether the position, that the charter route must pass near Wilkes County in order to reach the North Carolina boundary line of the State, and that, therefore, the charter would clothe Wilkes County with authority, as a county near the proposed line, the Circuit Court of Appeals, in the same paragraph, fell back upon the position, that, "the invalid legislative enactment attempted to be passed"—"the Act of February 20, 1879, which is recited in the bonds as authority for issuing them, definitely located the road running into Wilkes County." In explanation the Court said further (record, page 116): "It does it by enacting, that Section 13, of the Convention Ordinance, shall be amended by adding certain words, which make it read when so amended as follows:

"So far as now appears, the amendment locating the road into Wilkes County, was validly passed and became a valid law of North Carolina."

If the last paragraph means that Section 4 (page 15, of the record) is valid, then it overruled the Supreme Court and contradicted its own statement in a previous paragraph that the attempted legislation was void.

If the Court intended to rest its ruling upon the authority of the ordinance alone, it was inconsistent and illogical to fall back upon the later act.

If the Court meant to assert the position that the authority

was conferred by the Act of 1879, as an amendment, then that act would be valid, as a grant of power by virtue of the amendment to the charter in Section 2, but void as a grant of power by virtue of Section 4.

The Constitution (Art. II, Sec. 14) provides that, "No law shall be passed * * * to pledge the faith of the State, *directly or indirectly*, for the payment of any debt, or to impose any tax upon the people of the State, *or to allow the counties, cities or towns to do so*, unless the bill for the purpose," etc.

How, in the face of this prohibition, could Wilkes County be vested by the Act of 1879, with authority, which had not been previously granted, if that act was "no law?"

The Circuit Court of Appeals sought to correct the supposed mistake of the Supreme Court, in Wilkes County Commissioners v. Coler, in declaring that the Act of 1879 had never become a law of the State for any purpose, by holding that the legislation had indirectly authorized a county to pledge its faith through that section of the Constitution (it would seem needlessly), provided that such pledges should be made, neither directly nor indirectly."

The petitioners have attempted only to show errors in the leading opinion of the Court, and have not alluded to numerous errors of law and mistakes of fact contained in the concurring opinion, hoping to do this upon a final argument of the cause.

A. C. AVERY,
Counsel for Petitioners.

27404

Supreme Court of the United States

OCTOBER TERM, 1902.

No. 247.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY AND JOHN H. JOHNSON, SHERIFF AND EX OFFICIO TREASURER OF WILKES COUNTY, PETITIONERS,

against

W. N. COLER & CO., RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI.

BRIEF FOR PETITIONERS.

A. C. AVERY, *Counsel for Petitioners.*

THIS CASE BELONGS TO ONE OF THE CLASSES IN WHICH THE COURT HAS ANNOUNCED THAT IT WILL EXERCISE ITS PLENARY POWER BY GRANTING WRITS OF CERTIORARI TO THE CIRCUIT COURTS OF APPEAL.

"We reaffirm in this case the propositions heretofore announced, to wit, that the power of this court in *certiorari* ex-

tends to every case pending in the circuit courts of appeal, and may be exercised at any time during such pendency, provided the case is one which, but for this provision of the statute, would be finally determined in that court, and, further, that while this power is co-extensive with all possible necessities and sufficient to secure this court a final control over the litigation in all the courts of appeal, it is a power which will be sparingly exercised, and *only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflicts between two or more courts of appeal, or between courts of appeal and the court of a State, or some matter affecting the interest of this Nation in its internal or external relations, demands such exercise.*

"Among the considerations thus suggested are those which *indicate why, in this case, the court properly exercised its power and issued the writ of certiorari. There was a conflict between the decision of the circuit court of appeals for the seventh circuit and the supreme court of the State of Indiana.* The latter court had declared that the proceedings by which the contiguous territory was annexed to the city of Hammond were legal, and, therefore, that the territory was to be considered by all the officers of the State of Indiana as within the territorial limits of the city. The United States circuit court of appeals, by its decision in this case, had declared that such annexation proceedings were invalid, and that the property of the petitioner was not within the city limits. This tract of plaintiff's was not on the extreme limit of lands sought to be incorporated into the city, and, if the decision of the circuit court of appeals was enforced, there would be a tract of a few hundred acres within the exterior boundaries of the city of Hammond, as defined by the judgment of the supreme court of the State, withdrawn from the city jurisdiction, and, in fact, excepted from its territorial limits. *All the unfortunate possibilities of conflict and collision which might arise from these adverse decisions were suggested when this application for certiorari was made, and, although no final decree had been en-*

tered, it seemed to us a duty to bring the case and question here for examination at the earliest possible moment."

Forsyth *v.* Hammond, 166 U. S., 506, 514, 515.

It will be seen by reference to pages 71, 72, 96, and 97 of the printed Record that the judgment affirmed by the supreme court of North Carolina in Commissioners *v.* Call, 123 N. C., 308, 327, is in conflict with the judgment of the circuit court for the western district of North Carolina affirmed by the decision of the circuit court of appeals for the fourth circuit, at Richmond, February 4, 1902. (See printed Record, page 123.)

Petitioners are advised that it is sufficient, upon the hearing of the preliminary motion, to show that the case referred to in the petition belongs to a class in which the court has declared its purpose to exercise its plenary power by reviewing the conflicting decisions and determining what is the law.

The two courts whose differences have given rise to this conflict, being courts of last resort, whose decisions, as a rule, must be followed, the petitioners take it for granted that so grave a question will not be considered by the court which is the final arbiter without a full discussion upon the merits. They will therefore submit a short brief to show that the issues of law raised have, at every stage of their consideration in different courts, and upon every question involved, given rise to conflict of opinion between learned and distinguished jurists, and that these differences, according to the settled practice of the court, should be reviewed only after hearing counsel for both parties and after due deliberation.

The agreement (pages 94 and 95 of printed Record) does not affect the question whether such conflict of opinion has arisen.

A part of the agreement referred to is as follows, to wit:

"It is further admitted and agreed between counsel that it may appear as a part of the record on appeal that an action was brought by Jessie M. Douglas and others as plaintiffs against The Northwestern North Carolina Railroad Company and others as defendants, returnable to the superior court of Guilford county at the June term 1888, for the purpose of preventing and restraining the Northwestern North Carolina Railroad Company from issuing mortgage bonds constituting a lien upon the completed road of said company to *and* in the extension of its line.

"3rd. That when the franchise and property of the Northwestern North Carolina Railroad Company was offered for sale under a decree of foreclosure made by the circuit court of the United States by the special master named in said decree at Winston, in the year 1894, R. M. Douglas, the justice who delivered the opinion of the court contained in said transcript was present and for and on behalf of his wife, as a stockholder, forbade said sale in writing, and appeared before the circuit judge and opposed the granting of the decree confirming said sale."

It will appear at a glance that the litigation referred to in the statement embodied in the agreement at the instance of counsel for the appellees involved the question whether certain mortgage bonds should be issued by the Northwestern North Carolina Railroad Company, and not the question whether a county should pay for capital stock in that company with its bonds. The appellants insist that there is no force in the contention of counsel for appellees in the circuit court (which led to the embodiment of the foregoing extract

in the agreement) that the facts therein stated affected in any way the opinion of the court in Commissioners *v.* Call, 123 N. C., 308, 327.

THE HISTORY OF THESE CONFLICTS OF OPINION.

FIRST. The bonds were declared invalid, and the Code, sections 1996 to 2000, was declared by the supreme court of North Carolina insufficient to authorize their issue (four justices concurring and but one dissenting), in *Commissioners v. Snuggs*, 121 N. C., 394.

SECOND. The circuit court of appeals reviewed the opinion of the circuit court of the western district of North Carolina, declaring the bonds valid, and (all of the judges, Goff, Morris, and Brawley, concurring) reversed the ruling of the circuit court and followed that of the supreme court of North Carolina.

Commissioners *v.* Coler, 96 Fed. Rep., 284.

THIRD. Upon petition to rehear, filed in the court of appeals, the mandate was stayed and the cause was held to await the decision of the Supreme Court upon the hearing on certificate in Wilkes County *v.* Coler, 180 U. S., 506–524, but the court declined to pass upon the question whether Wilkes county (or Stanley county) was empowered by sections 1996 to 2000 of the Code of North Carolina to issue bonds in aid of railroads extending through their counties, because that did not appear to be one of the questions certified.

FOURTH. It had been held to be the duty of the circuit court of appeals to follow the construction given to section 14, article II, of the constitution by the State court, and one

of the remaining questions is whether the Federal courts should follow the construction given by the State tribunal to sections 1996 to 2000 of the Code.

FIFTH. A bare majority, composed of Judges Morris and Boyd, decided to overrule the former decision of the court of appeals, while Judge Goff dissented. (See opinions in the printed Record, at page 110 *et seq.*)

The established rule of the Federal courts is to resolve all reasonable doubts in favor of the construction placed by the State tribunals upon their own statutes.

"The construction by the courts of a State of its constitution and statutes is, as a general rule, binding on the Federal courts. We may think that the supreme court of a State has misconstrued its constitution or its statutes, but we are not at liberty therefore to set aside its judgments. That court is the final arbiter as to such questions. In Claiborne County *v.* Brooks, 111 U. S., 400, 410 (28—470, 474), it was said: 'It is undoubtedly a question of local policy with each State, what shall be the extent and *character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States;* for it is a question that relates to the internal constitution of the body politic of the State.' (See also Burgess *v.* Seligman, 107 U. S., 20, 33; Butcher *v.* Cheshire R. Co., 125 U. S., 555; Detroit *v.* Osborne, 133 U. S., 492; South Branch Lumber Co. *v.* Ott, 142 U. S., 622; Kaukauna Water Power Co. *v.* Green Bay and M. Canal Co., 142 U. S., 254; McElvaine *v.* Brush, 142 U. S., 155; Stutsman County *v.* Wallace, 142 U. S., 293, quoting Norton *v.* Shelby County, 118 U. S., 425, and Gromley *v.* Clark, 134 U. S., 338; Morley *v.* Lake Shore M. S. R. Co., 146 U. S., 162; Bauserman *v.*

Blount, 147 U. S., 647; May *v.* Teney, 148 U. S., 60; Baltimore and O. R. Co. *v.* Baugh, 149 U. S., 368, 373; Lewis *v.* Monson, 151 U. S., 545; Baikam *v.* Woodstock Iron Co., 154 U. S., 177, quoting Leffingwell *v.* Warren, 67 U. S., 2 Black., 599, 603.)"

Where it is found that no construction had been given to a statute by the State court, when the transaction was entered into, the Federal courts "*will lean toward an agreement of views with the State courts, if the question seems to them balanced with doubt.*"

Burgess *v.* Seligman, 107 U. S., 17, 38.

It is true that all courts incline to hold commercial paper, in the hands of innocent purchasers for value, valid, but nowhere, except in the concurring opinion of Judge Boyd and in the brief of Mr. Price, have we found an intimation that in order to uphold municipal bonds, "if it can do so under any circumstances" or "if it is possible to do so," a Federal court must lean against instead of in favor of a ruling by a State tribunal that the creation of a debt by a municipality was *ultra vires*. Justice Gray, in Louisville R. Co. *v.* Louisville Trust Co., 174 U. S., 573, 574, said, quoting 10 Wall., 604:

"Where a party deals with a corporation in good faith, *the transaction is not ultra vires, and he is unaware of any defect in authority*, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists."

THE CONTENTION OF THE PETITIONERS IS THAT THE AUTHORITY TO SUBSCRIBE WAS LIMITED TO A CERTAIN CLASS OF COUNTIES. IF A COUNTY WAS NOT A DONEE OF SUCH POWER BY REASON OF BELONGING TO SUCH CLASS, IT COULD NOT CONFER SUCH AUTHORITY ON ITSELF BY RECITATIONS EITHER IN BONDS OR IN THE MINUTES OF ITS GOVERNING OFFICIALS.

If the legislature had not intended to restrict the power of "the boards of commissioners of the several counties" to aid railroads to those in which the citizens of the county may have an interest, it would have *omitted the qualifying clause "when necessary to aid in the completion of a road in which the citizens of the county may have an interest,"* and have allowed any county to subscribe stock "to any railroad company or companies." The qualifying words are surplusage, according to the construction of the circuit court of appeals.

If the clause descriptive of the company to which the subscriptions might be made is not meaningless and mere surplusage, it confers power only on a certain class of counties. *If a county not authorized attempts to subscribe, it is acting ultra vires.* Whether there is anything in the transaction to excite suspicion or not, a purchaser is bound to look to the power of a municipality to issue bonds, and must lose when he buys bonds issued without legislative authority.

The language of Code, section 1996, relied upon as authority for the issue of the bonds, is as follows:

"*The boards of commissioners of the several counties shall have power to subscribe stock to any railroad company or companies when necessary to aid in the completion of any railroad in which the citizens may have an interest.*"

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What is meant by the words "any railroad in which the citizens of a county may have an interest"? The petitioners submit that the courts of America and the British Empire have uniformly construed the word "interest" in such connections to mean "pecuniary interest" in the thing referred to—here, in the railroad.

DEFINITION OF THE WORDS "INTEREST" OR "INTERESTED."

In construing a statute prohibiting any member of a council from having a direct or indirect interest in a contract of the corporation, the supreme court of Michigan, in Swedly *v.* Kirby, 79 N. W. R., 188, said:

"This indicates that a pecuniary interest was intended. Anderson defines interest as such relation to the matter in issue as creates a liability to pecuniary loss or gain from the event of a suit."

Taylor *v.* Highway Commissioners, 88 Ill., 527.
Northampton *v.* Smith, 11 Met. (Mass.), 395.

In a case where the question was whether a salaried employé of a firm of contractors was interested in the contracts of the firm, the Pennsylvania court said:

"The word interested does not mean anything but pecuniary interest, and of this there is no evidence."

Dunlap *v.* Philadelphia, 13 W. N. C. (Pa.), 98.

The supreme court of Illinois, in passing upon the questions whether the State had an interest, within the meaning of the statute in a *quo warranto* proceeding to try title to an

office, said: "The interest which a State must have in such a cause is *a substantial interest as a pecuniary interest.*"

McGrath *v.* People, 100 Ill., 461.

In State *v.* R. Co., 36 N. J. L., 164, the court, drawing the distinction between estates and interest in a statute providing for condemnation of right of way, said:

"Under the more comprehensive term, 'persons interested,' are included not only persons in whom is vested the legal title which the company proposes to acquire, * * * but also other individuals having some independent right or interest therein, * * * such as an easement of a right of way, inchoate rights of dower or courtesy, or incumbrances, such as by judgments or mortgages, which are charges on the legal estate. The object is * * * that their interest may be extinguished by payment."

The supreme court of California, construing a statute allowing a party "beneficially interested" a writ of review of an order of the board of supervisors, granting a right to use a highway for the purpose of constructing a railroad, held that an affidavit alleging that "affiant, in common with others living along the highway, would be damaged," was insufficient, and said:

"It does not appear by the petition in this case that the *petitioner has any other or greater right in the highway mentioned therein than any other citizen of the State.* * * * In an application made by a private party, *his interest must be of a nature distinguishable from that of the mass of the community.*"

Linden *v.* Alameda County, 45 Cal., 7.

Ashe *v.* Colusa County, 71 Cal., 236.

If a person living on a highway has "*no other or greater interest therein than any other citizen of the State,*" *then a person living on or in the vicinity of an improved highway—a railroad—has no other or greater interest in the railroad* than any other citizen of the State, and the citizens of Wilkes county, whether they live along or away from the line of railway, "*have no other or further interest therein than any other citizen of the State.*"

ADDITIONAL AUTHORITIES CONSTRUING "INTEREST" AS MEANING A PECUNIARY, VALUABLE, OR BENEFICIAL INTEREST, NOT MERELY A PATRIOTIC OR SENTIMENTAL INTEREST WHICH A CITIZEN OF A STATE OR COUNTY FEELS IN A PUBLIC IMPROVEMENT.

As shareholders, by reason of a subscription already made, the citizens of the county would have an interest in any contract from which, as shareholders, they might derive profit, as by making an incomplete road more valuable by extension.

Todd *v.* Robinson, Q. B. D., 739.
Hunnings *v.* Williamson, 112 Q. B. D., 536.

"Beneficial interest" was construed to mean present, vested, or valuable interest by the supreme court of Massachusetts.

Dexter *v.* Cotting, 149 Mass., 92.

Interest in an estate or action, where requisite to give a person standing in court as a party to an action, is uni-

versally construed to be a beneficial, valuable, vested, or pecuniary interest.

Bachman *v.* Packard, Q. Fed. Cas., No. 709.
Northampton *v.* Smith, 11 Met. (Mass.), 395.
Goodall *v.* Tuttle, 10 Fed. Cas., No. 5533.
Whitney *v.* Brittain, 16 N. Y. App. Div., 457.
Hevin *v.* Valcano, etc., Co., 13 Ca., 62.
Bugher *v.* Gott, 3 N. Y. Supp., 518.
Whitney *v.* Barley, Q. B. D., 154.
Burgess *v.* Clark, 14 Q. B. D., 735.
Gasquet *v.* Johnson, 1 La., 431.

The interest which disqualifies a judge from sitting is held to be "a property interest" in the action and its results, not "the interest which he may have in common with other citizens in a public matter."

Sauls *v.* Freeman, 24 Fla., 209.
Chicago, etc., R. Co. *v.* Kellogg, *supra.*

The foregoing list of authorities might be enlarged by adding scores of cases in which the word interest is interpreted in the same way, but it is not deemed necessary to cite any but the following:

Taylor *v.* Norment, 88 Ill., 327.
Wilson *v.* Railroad, 37 Ala., 358, 360.
In re Estate of White, 37 Cal., 100.
Shelton *v.* Derby, 27 Conn., 415, 421, 425.
Smith *v.* Phillips, 62 Ala., 578.

"Interest" is defined in dictionaries, where it relates to property such as railroads, generally as a legal concern of a

person in a thing, or in the conduct of another person, whether it consist in the right of enjoyment of or benefit from property or right to claim an advantage, or be subjected to a liability on account of the conduct or management of property.

In other words, an interest is either a legal right in a thing, as property, or such a relation to it as to enable one to participate in the profits of its conduct or management, or share in the loss arising from its management.

One of the definitions given by the Standard Dictionary of "*interested*" is "*being a part owner; as one interested in railroad shares.*"

It is contended for the petitioners that the citizens of a county, collectively, could only be interested, in the ordinary and obvious meaning of the word as applied to railroads, where the corporation, which embodied all rights of the citizens as a body, has some interest in the shares of its stock. This definition is in harmony with the contention of the petitioners that the last clause of section 1996 is surplusage, unless it restricts the power to subscribe to roads in which the county may already own shares of stock.

The lexicons and law books uniformly define an interest in any kind of property in the same way. If the word has no technical meaning, then it must be interpreted according to its ordinary meaning.

Adams *v.* Turrentine, 30 N. C., 147.
Blue *v.* McDuffie, 44 N. C., 13.
Randall *v.* Railroad, 107 N. C., 748, 750.

Whatever rule of construction may be followed, the interpretation must be the same, and, seeing this, on the first

hearing, Judge Goff incorporated into the opinion the entire discussion of this point by the supreme court of North Carolina in Commissioners *v.* Snuggs, expressing briefly the approval of the court.

On the other hand, in the opinion delivered on February 4, 1902, in Commissioners of Stanly *v.* Coler & Company, the court assumes that the legislature did not mean "interest" in the sense of "pecuniary interest," because the qualifying word was inserted in the Constitution in reference to the State, but was omitted from the statute. The court said the words "in which a citizen of a county may have an interest" in a railroad would seem to be the appropriate words to express the general interest which the whole body of the people of a county have in a railroad which they believe will benefit them, as distinguished from direct pecuniary interest of the county as a corporation. This construction of the word by the court of appeals is in direct conflict with the authorities cited, and is not supported by a single reference to law book or lexicon. The construction of the State court is set aside without a discussion, because that court, following the overwhelming weight of authority, held that the word "pecuniary" could only intensify and emphasize the word "interest," and that the word "interest," in such a connection, was intended to denote pecuniary interest, and was, except for the purpose of emphasis, surplusage. *But half of section 1996 is declared surplusage by the court of appeals in order to lean against the construction of the State court.*

This opinion is remarkable in that it disposes of the ruling of a State court with so little ceremony, and in that, though overruling the construction given by the State court

to its own statute, it substituted its own interpretation without citing an authority to sustain its views. Indeed, no reason whatever is given for rejecting the definition of the court, though it would seem that the concensus of opinion in all courts has been that, when applied to property, an interest means a pecuniary interest; and no regret is expressed for disregarding the State's construction.

Was it not reasonable and proper that the supreme court of North Carolina should adopt the definition given both by law books and dictionaries, and should have added that such an interpretation of a statute enacted by the reconstruction legislature was in harmony with the policy of the reconstruction constitution? Of this, that court, having knowledge of the peculiar conditions in the State and its policy, as indicated by a comparison of its various laws and their interpretations, was certainly more competent to judge. (See discussion of policy, *post.*)

Judge Boyd, in the concurring opinion in Commissioners *v.* Coler, *supra*, declares it to be both the right and duty of the court of appeals to "construe the language of sections 1996–2000 according to their natural and proper meaning;" but he fails to refer to law books or lexicons from which that court gathered the "natural and proper meaning."

We challenge the respondents to produce authority of courts or scholars for such a definition of interest as applied to a railroad.

The statute requires the subscription must be "necessary to aid in the completion of any railroad," etc.

The petitioners respectfully insist that the word "COMPLETION" has also a most material bearing upon the ques-

tion of legislative authority—that is, in indicating the *class of counties* to which the act refers.

Judge Goff, in delivering the unanimous opinion of the circuit court of appeals, 96 Fed. R., *supra*:

"But did the sections above mentioned give additional and complete authority to order the elections, issue the bonds and levy the taxes to pay them, principal and interest? Section 1996 is in these words: 'The boards of commissioners of several counties shall have power to subscribe stock to any railroad company or companies when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest.' It will be necessary, in order that that section may be construed to give authority to the commissioners to issue the bonds, that the language should include a railroad not begun to be built before the constitution was adopted; that the word 'completion' should be construed 'building' or 'construction,' extending even to the building of a new road; for, in the case before us, it appears that the road had not begun to be built. We cannot see why the word 'completion' should be thought to have been used by the legislators in any other sense than the one most usual and natural. Ordinarily, the words 'to complete' are understood to mean 'to finish,' 'to fulfill,' and the word 'completion' to mean the 'finishing' or 'accomplishing in full' of something which has already been commenced; as, for instance, it is most frequent to hear the word 'completion' used in connection with the finishing years and months of the education of the young. The object of the statute must have been to provide, by general act, means by which the counties, without special legislation for each county by separate bills, might be enabled to complete unfinished railroads in which the counties had a pecuniary interest. At the time of enactment of the statute of 1868–'69, and always since that time, any county of the State, duly observing the limitations of section 7 of

article VII of the constitution, and under an act passed according to the requirements of section 14, article II, of the constitution, could, and can, subscribe to the capital stock of a railroad company, whether unfinished or to be begun. *The act of 1868–'69, however, considering the condition of the affairs then existing—that is, that there were counties which had a pecuniary interest in the railroads that had been begun, but unfinished—enabled such counties to make subscriptions of bonds to complete such unfinished roads at the earliest moment and with the least cost, by general law, passed according to section 14, article II, of the constitution.*"

THE LEGISLATURE OF NORTH CAROLINA INTENDED TO EMPOWER ONLY THOSE COUNTIES WHICH HAD ALREADY INVESTED IN THE STOCK OF A RAILROAD COMPANY, BUT HAD NOT THEREBY EFFECTED THE COMPLETION OF THE LINE TO MAKE AN ADDITIONAL SUBSCRIPTION TO THE STOCK.

Because, FIRST, any other construction would have allowed a subscription to be made by any county in the State, for the citizens of Wilkes county, by reason of vicinage, *had no other or greater interest "in the railroad than any other citizen of the State.*"

SECOND. According to all rules of construction, it must be assumed that the legislature intended to describe a class of counties, and limit the power to them, since it is an established rule that the courts must, if possible, give effect to all of the words of a statute, as the supreme court of North Carolina did; whereas the court of appeals found it necessary, in order to sustain the bonds, to construe the words of limitation as mere surplusage.

THIRD. It is an historical fact, alluded to in Galloway *v.* Chatham Railroad Co., 63 N. C., 147, and University *v.* Holden, 63 N. C., that counties, as well as the State, had been lending their credit and subscribing to the stock of railroad companies, and that section 14, article II, and section 7, article VII, of the constitution of 1868 had been inserted in that instrument to restrain counties from reckless expenditures of this kind, just as sections 1, 4, article VI, had been framed as a check upon extravagant legislation by the State. (See 63 N. C., page 147.)

FOURTH. Sections 1996 to 2000 of the Code were first enacted by the reconstruction legislature of 1868, which attempted to shape the statutory law so as to bring it into harmony with the constitution, and it is in harmony with the general policy of the State to construe the restrictive clause of section 1996 as conferring the authority to subscribe on counties already interested pecuniarily in the railroad to which they propose to subscribe, just as the legislature, in order to protect investments already made by the State, was empowered to subscribe to railroads in which the State had already become interested.

FIFTH. Section 3766 of the Code (enacted in 1868) provides that where statutes are re enacted "the portions not altered are to be considered as having been the law since their enactment; and at the time of their enactment."

Neither the Code, sections 1996 to 2000, nor the charter are sufficiently specific to comply with article V, sections 6 and 7, of the constitution.

In Commissioners of Buncombe County *v.* Payne (123 N. C.,

432, 488, decided December 8, 1898, a month after the opinion was filed in Commissioners *v.* Call, on November 9, 1898, and during the same term), the court said, at page 448:

"*A general act, authorizing any and all counties to issue bonds, would be invalid, especially when (as in the case here) it is necessary* to exceed the constitutional limitation *to pay interest or principal.* Tate *v.* Commissioners, 122 N. C., 812 (at page 815); Herring *v.* Dixon, *id.*, 420 (at page 124)."

In Commissioners of Wilkes *v.* Call, 123 N. C., 308 (at page 324), Justice Douglass said, in reference to the necessity for specific statutes:

"If the word 'uncompleted' can refer to any road not yet begun, and the word 'interest' apply to a mere friendly feeling or supposed advantage to be derived from the general building up of a country, then the several counties may go on *forever subscribing unlimited amounts to any railroad in esse or in futuro that may be located within the range of their knowledge. Such a construction would simply nullify the constitution by making its explicit restrictions vain and worthless. It cannot be adopted by us, but, if we were forced to adopt it, we would be equally forced to declare those sections null and void. If they mean that, they have no place upon the statute books.* While the legislature may, in individual cases, grant to specific counties the necessary authority, in accordance with the provisions of the constitution and subject to its restrictions, *it cannot, by a sweeping act of unlimited application, utterly destroy its operation.* If the legislature or the railroad company or the county had placed any such construction on those sections, additional legislation would have been deemed useless, and the recitals in the bonds would have been different."

In short, the declaration of the State court is that the sections referred to, if susceptible of the construction placed

upon them by the circuit court of appeals, were in violation of the constitution (referring, of course, to article V, sections 6 and 7).

Article V, sections 6 and 7, are as follows:

"SEC. 6. *Taxes levied by county commissioners.*

"The taxes levied by the commissioners of the several counties for county purposes shall be levied in like manner with the State taxes, and shall never exceed the double of the State tax, *except for a special purpose, and with the special approval of the General Assembly.*

"SEC. 7. *Acts levying taxes shall state object, etc.*

"*Every act of the General Assembly levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other purpose.*"

There is no finding as a fact in Commissioners *v.* Payne, *supra*, that the levy of a tax sufficient to meet the interest "or principal" at maturity would exceed the constitutional limit (of sixty-six and two-thirds cents on the hundred dollars in value of property taxed). But the court takes judicial cognizance of public law and reports of the auditor as to the assessed value of property and the amount of taxes imposed. Upon this information, which is within the reach of every citizen who can read as well as of the court, the court declared that it would be necessary to exceed the limit in order to pay interest and principal at maturity of the Buncombe debt.

For like reason Justice Douglass said, in Commissioners *v.* Call (123 N. C., page 324), in condemning the construction of the Code now adopted by the circuit court of appeals, which would allow all counties to subscribe "unlimited

amounts to any railroad *in esse* or *in futuro*, that may be located within the range of *their knowledge*," said:

"Such a construction would simply nullify the constitution *by making its explicit restrictions vain and worthless. It cannot be adopted by us, but if we were forced to adopt it, we would be equally forced to declare those sections null and void. If they mean that, they have no place upon the statute books.*"

Judge Douglass was warranted in declaring, of his judicial knowledge, that it would be necessary for Wilkes county to exceed the constitutional limit. Were we to concede the soundness of the position taken by the court of appeals that it is not essential to levy a special tax "in the same bill," except when the tax will exceed the limit, then our position would be untenable under even that rule.

The construction placed by Justices Clark and Douglass, speaking for the court in the Buncombe and Wilkes cases, upon the State constitution finds support in older adjudications of the State court.

THE SETTLED LINE OF DECISIONS OF THE SUPREME COURT OF NORTH CAROLINA PRIOR TO OCTOBER 1, 1889, WHEN THE WILKES COUNTY BONDS WERE ISSUED, IS IN ACCORD WITH THE RULING IN COMMISSIONERS V. PAYNE, SUPRA, THAT A GENERAL ACT PURPORTING TO AUTHORIZE "ANY AND ALL COUNTIES TO ISSUE BONDS WOULD BE INVALID BECAUSE OF FAILURE TO PROVIDE FOR LEVYING A SPECIAL TAX."

In Galloway *v.* Chatham Railroad Company, 63 N. C. R., 151, 152 (decided at January term, 1869), the court held that there were two conditions upon which the State should be

allowed to contract a new debt before the bonds of the State should be at par (under a fair interpretation of article IV, section 5, of the constitution):

1st. Unless it (the legislature) shall, in the same bill, levy a special tax to pay the interest annually, and

2d. "Unless the subject be submitted to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon."

The court held in that case that the meaning of the section is that "the General Assembly shall have no power to create new debt or pecuniary obligation (except in two specified cases), unless *a special tax be levied in the same bill to pay the interest.*"

Thirty years later Justice Clark, delivering the opinion of the court in Commissioners *v.* Payne, 123 N. C., at page 488, construed sections 6 and 7 of article V of the constitution of North Carolina, which is as follows:

"SECTION 7. Every act of the General Assembly levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other."

In connection with the prohibition in section 6 of article V, that the tax levied by the counties "shall never exceed the double of the State tax, except for a special purpose and with the special approval of the General Assembly."

Judge Clark declared, for the court, that neither the general provision of the Code, section 1999, nor the general provision of the charter of the Northwestern North Carolina Railroad Company, construed in connection with that of the

Atlantic and North Carolina Railroad Company, was sufficiently specified to confer authority on Wilkes county to subscribe or issue the bonds or levy the tax to meet the principal and interest of the bonds.

The provisions of the Code and of the charter referred to are as follows:

"SEC. 1996. The boards of commissioners of the several counties shall have power to subscribe stock to any railroad company or companies, when *necessary to aid in the completion of any railroad in which the citizens of the county may have an interest.*"

"SEC. 1999. In case the county shall subscribe the amount proposed in bonds, the board of commissioners shall have power to fix the rate of interest, not to exceed the rate of eight per cent., when the interest on said bonds shall be payable, and at what place, and shall also fix the time and place of paying the interest, and shall also determine the mode and manner of the same; and also to raise by taxation, from year to year, the amount necessary to meet the interest on said bonds."

"SEC. 2000. The taxes authorized by the three preceding sections to be raised for the payment of interest or principal, shall be collected by the sheriff in like manner as to other State taxes, and be paid into the hands of the county treasurer, to be used by the chairman of the board of county commissioners as directed by this chapter."

SECTION 12 OF THE CHARTER (PAGE 54 OF THE PRINTED RECORD), SECTIONS 33 AND 36 OF THE CHARTER OF THE ATLANTIC AND NORTH CAROLINA RAILROAD (PAGES 54 AND 55 OF THE PRINTED RECORD).

"SEC. 12. *Be it further ordained*, That the stockholders of said company may pay the stock subscribed by them either

in money, labor, material for constructing said road, as the board of directors may determine, and that *all counties or towns subscribing stock to said company shall do so* in the same manner and under the same rules and regulations and restrictions as *are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company, for the government of such towns and counties as are now allowed to subscribe to the capital stock of said company.*"

Chapter 136 of the Laws of North Carolina, session 1852.

"SEC. 33. *Be it further enacted,* That it shall be lawful for any incorporated town or county near or through which said railroad may pass to subscribe for such an amount of stock in said company as they shall be authorized to do by the inhabitants of said town or the citizens of said county, in *manner and form as hereinafter provided.*"

"SEC. 36. *Be it further enacted,* That for the purpose of paying the quotas on said stock as may be called for, or in the installments of such subscriptions as may fall due, the town authorities and the justices of the county shall have power to appoint an agent or agents to negotiate a loan or loans for and in the name of such town or county; and it shall be the duty of the authorities of such town and the justices of such county to levy such taxes annually on the persons, lands and other personal property within such town and county as may be sufficient to pay the amount of such loan or loans and the interest thereon, and as said town authorities and justices of such county shall deem necessary and proper, and to make such order or orders as shall be deemed necessary for the due collection and payment of the same; and the stock subscribed on behalf of such town and county shall stand pledged for the payment of the loan thus authorized to be contracted."

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The constitution of North Carolina provides as follows:

"ARTICLE II, SEC. 21. The style of the acts shall be: *The General Assembly of North Carolina do enact.*"

The supreme court of North Carolina, in State *v.* Patterson, 98 N. C., 660, 661, 662, 665, 666 (decided September, 1887, two years before the bonds were issued), held that a statute in all other respects in the form prescribed, but without the prescribed enacting clause, was void.

The court declared all of the requirements of the constitution to be mandatory, using, at pages 661, 662, the following language:

"It (the constitution) is not to be disregarded, ignored or suspended, or broken, in whole or in part, nor can any officer, or a co-ordinate branch of the government, supply, superadd or assume power and authority not conferred by it. In this latter respect, it expressly provides that 'all powers not herein delegated remain with the people.'

"More particularly, for the present purpose, when the constitution prescribes and directs in terms, or by necessary implication, that *a particular power shall be exercised in a specified way, or a particular thing shall be done by a particular co-ordinate branch of government—as the legislature—or by a particular officer or class of officers, and prescribes the way and manner of doing it, such direction cannot be disregarded; a due observance of it is essential, because the constitution so provides, and its provisions are not in vain or of trifling moment. It is not of the nature of constitutions of government to provide non-essentials—useless, unimportant details—such as may be disregarded and dispensed with.* As we have said, they are organic—made upon solemn consideration by the sovereign authority, and contain general, essential provisions—details are avoided, unless deemed important—essential.

"The answer to these and like questions must be, that re-

quirements of the constitution shall prevail and be observed; and when it prescribes that a particular act or thing shall be done in a way and manner specified, such direction must be treated as a command, and an observance of it essential to the effectiveness of the act or thing to be done. Such act cannot be complete—such a thing is not effectual—until done in the way and manner so prescribed" (Wilkes County Commissioners *v.* Coler, 180 U. S., 506, 521).

Justice Clark in Commissioners v. Payne, 123 N. C., at page 488, construed the command contained in the latter half of section 6, and in section 7, of the constitution according to the rule laid down in State v. Patterson, supra, two years before the bonds were issued in 1889, to wit, in September term, 1887. Justice Douglas followed the same rule when he declared that the provisions of the charter and the sections of the code had no place on the statute book, if susceptible of the interpretation that they gave the same general authority to other counties as was given to Forsyth county.

By reference to Bank *v.* Commissioners, 116 N. C., 339, and Bank *v.* Commissioners, 119 N. C., 214, it becomes apparent that the court of appeals drew an inference from the two opinions that was unwarranted. The controversy was as to the validity of a subscription by the town of Oxford to a railroad company, which was chartered to build a railroad connecting the town of Oxford with the coast line, just as the ordinance of 1868 authorized the connection of Winston-Salem, in Forsyth county, intersecting by a line with the North Carolina road somewhere from Greensboro to Lexington. The town of Oxford was designated as the initial point of the proposed road, and the sufficiency of the authority was questioned in the first case (see 116 N. C., 363), because

the legislature had failed to provide in the charter itself the machinery for holding the election, and the court decided that the general acts providing for holding such elections furnished the necessary authority as to the manner of holding them and counting votes; but it was not till the question was raised on the second appeal (119 N. C., 214) that the supreme court of North Carolina ever considered whether the authority to create the debt, *even with the approval of the voters of the town*, had been granted by the legislature, and, then, apart from the question of estoppel, the discussion, on the argument and in the opinion of the court, was directed to the new evidence showing that the statute relied on as authority for issuing the bonds was not enacted in accordance with the requirements of article II, section 14, of the constitution.

It is a significant fact that the act of 1868 (Code, secs. 1996 to 2000) was not referred to by Justice Bynum in the opinion in Belo v. Commissioners, nor by counsel in the argument of that case, though the action was brought by Mr. McCorkle, former reporter and one of the ablest lawyers in the State, and though the case was decided eight years after the passage of the act of 1868–'9.

THE CASES OF HERRING v. DIXON, 122 N. C., 420, AND TATE v. COMMISSIONERS, 122 N. C., 812, SUSTAINED JUDGE CLARK'S POSITION AS TO THE INSUFFICIENCY OF STATUTES PURPORTING TO CONFER GENERAL AUTHORITY ON COUNTIES TO CREATE DEBTS EXCEPT FOR NECESSARY EXPENSES.

It will be observed that the act construed in Herring v. Dixon, *supra*, conferred certain powers on three counties specifically named in the act, to wit, Green, Wilson, and

Wayne, and that the statute construed in Tate *v.* Commissioners, *supra*, named Haywood county as the donee of certain power.

No power to Wilkes county is written in the charter by the reference to the other charter, because—

1st. It is a familiar and elementary rule of construction that grants of powers to municipal corporations by a sovereign State are construed strictly, both as to the designation of the donees of the powers and the nature and extent of the authority granted.

2d. It is not pretended that there is any grant of power in the charter itself to any county to subscribe except that contained in section 12, *supra*, to wit, "*all counties or towns subscribing stock to said company shall do so in the same manner* and under the same rules, regulations, and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company for the government of such towns and counties *as are now allowed to subscribe to the capital stock of said company.*" This designates no county, either by name *or* "*writing into*" the sections referred to. The counties that do subscribe under the ordinance of 1868 must "do so in the same manner and under the same rules and regulations and restrictions as are prescribed" in the other charter. The provisions of chapter 136, Laws of 1852, "*are written into*" *the ordinance for the purpose of furnishing a method of proceeding in submitting the question of subscription to the people and making a subscription after voting.*

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3d. It is a forced construction which interprets a reference to the "rules, regulations, and restrictions" imposed in another charter "for the government of such towns and counties as are allowed to subscribe to the capital stock of said company as a grant of power to all such counties as lie near the line of the new company, because "all counties near or through which" the line of the older company passed were permitted by express grant of form to subscribe to the company building it. This is a claim that the power to subscribe is given to Wilkes county by implication arising out of the charter. Judge Douglas, in Commissioners v. Call, 123 N. C., at page 316, meets that suggestion as follows:

"But corporate powers can never be *created by implication nor extended by construction.* No privilege is granted unless it be expressed in plain and unequivocal words, testifying the intention of the legislature in manner too plain to be misunderstood. When the State means to clothe a corporate body with a portion of her sovereignty and to disarm herself to that extent of powers which belong to her it is so easy to say that we will never believe it to be meant when it is not said; and words of unequivocal import are so easily inserted by mistake or fraud, that every consideration of justice and policy requires that they shall be treated as nugatory, when they find their way into the enactments of the legislature. In the construction of a charter, to be in doubt is to be resolved; and every resolution which springs from doubt is against the corporation. This is the rule sustained by all the courts in this country and in England. No other has ever received the sanction of any authority to which we owe much deference. This court has asserted it times without number. We have ruled five or six important cases upon it within the last year. We seem not to have

made much impression on the professional mind, and we are probably making little now. But when respectable counsel call upon us hereafter (as they doubtless will) to enlarge corporate powers by construction, we can only repeat again and again that our duty imperatively forbids it. The privileges of the Pennsylvania Railroad Company may be too rigidly restricted. If the usefulness of the company would be increased by extending them, let the legislature see to it; but let it be remembered that *nothing but plain English words will do it.*"

In Belo *v.* Commissioners (upon which the court of appeals rests its decision) we find (76 N. C., at page 493) the following:

"This rule, however, which subsists between individuals, is much modified in respect to *corporate bonds, such bonds can be issued only in pursuance of a special grant of power*, and the party claiming the benefit of such bonds must show power in the corporation to issue them."

4th. The court, in Call *v.* Commissioners, *supra*, at page 313, in discussing the effect of section 12, said:

"That said ordinance cannot be relied on to support the validity of the bonds at issue is apparent for several reasons: *First, we do not see that any authority whatever was given or attempted to be given by either of these sections to Wilkes county to subscribe to the capital stock of this company.*"

5th. The fact cannot be ignored that the court was influenced in Belo *v.* Commissioners (76 N. C., at pages 497, 498) by the expressed view that the act of August, 1868, "validated both the county subscriptions and the issue of bonds," as will appear from the following (see page 496):

"Declaring, as we do, that the ratifying act of August 1868, was a curative act, and validated both the county sub-

scription and the issue of the bonds, if any defects existed therein—and it has been one purpose of this opinion to show that the bonds were valid in the hands of *bona fide* holders without the aid of this healing act—*the proposed evidence of the defendant became immaterial and irrelevant.* As a matter of law, the bonds were valid, and the court did not err in so declaring."

It is significant that "*the proposed evidence of the defendant became immaterial*" *only in view of the ruling that the curative act of August, 1868, validated the subscription and bonds.* (See extract.) *It nowhere appears what the evidence was, but there can be no question that the defendant, Forsyth County, offered evidence which, but for the curative act, would have been material. The act of 1868 was then treated as a valid act.* Now, in the light of the evidence adduced, the Supreme Court of the United States has held that it is no law. The material evidence excluded, because immaterial on account of the treating the act of 1868 as valid, might have turned the scales, as it would have gone to the jury upon the issue submitted. It is important to recollect that, just after the declaration by the court (Belo *v.* Commissioners, 76 N. C., page 498) that "*the proposed evidence of the defendant became immaterial and irrelevant*" in view of the fact that the curative act validated the bonds, the court proceeds, as pertinent to that part of the discussion, to make the following statement:

"The only issue submitted to the jury was, 'Is the plaintiff the *bona fide* owner and for value of the bonds and coupons mentioned in the pleadings, and was he such at the commencement of the action'"?

The court below excluded the testimony offered by the defendant bearing upon the validity of the bonds, announc-

ing as "a matter of law that the bonds were valid," and refused to submit any issue as to the validity, and the Supreme Court sustained this ruling because the validity of a curative act, which, in the light of the evidence offered in this case, is no law, was not then questioned. (See 76 N. C., page 498.) Wilkes County *v.* Coler, 180 N. C., 506, 521. (See opinion, printed Record, page 112.)

IT MUST BE REMEMBERED THAT THE ACT OF 1868 WAS RATIFIED AUGUST 11, AFTER THE RATIFICATION OF THE CONSTITUTION ON APRIL 24, 1868. IF THE SUPPOSITION THAT THE ACT OF 1868 WAS VALID RENDERED IRRELEVANT AND INCOMPETENT TESTIMONY WHICH WOULD HAVE BEEN MATERIAL IN BIELO *v.* COMMISSIONERS, SUPRA, IT FOLLOWS THAT THE ORDINANCE OF 1868, ALONE, DID NOT INVEST WILKES COUNTY WITH AUTHORITY TO SUBSCRIBE TO THE STOCK OF THE COMPANY AND ISSUE BONDS IN PAYMENT OF SUCH SUBSCRIPTION.

See questions asked by the court (Wilkes County Commissioners *v.* Coler, 180 U. S., 532):

"WAS WILKES COUNTY IN THE SAME CATEGORY WITH FORSYTH COUNTY? WAS THE ROUTE OF THE ROAD NORTHWEST OF SALEM AND WINSTON TO SOME POINT IN THE NORTHWESTERN BOUNDARY LINE OF THE STATE TO BE DETERMINED BY THE LEGISLATURE OR BY THE COMPANY? IF BY THE LEGISLATURE, WAS THE ROUTE EVER DETERMINED OTHERWISE THAN BY THE ACT OF 1879, WHICH HAS BEEN ADJUDGED NEVER TO HAVE BECOME A LAW OF THE STATE?

"DID WILKES COUNTY HAVE AUTHORITY UNDER THE ORDINANCE OF 1868, ALONE, TO AID BY A SUBSCRIPTION OF STOCK AND BONDS THE CONSTRUCTION OF THE SECOND DIVISION OF THE ROAD REFERRED TO IN THE ACT OF 1879, EXTENDING

FROM THE TOWNS OF WINSTON AND SALEM, UP THE VALLEY OF THE YADKIN BY WAY OF JONESVILLE AND WILKESBORO, IN THE COUNTY OF WILKES, TO PATTERSON'S FACTORY IN THE COUNTY OF CALDWELL?"

Wilkes County Commissioners *v.* Coler, 180 U. S., at page 532.

Referring to the act of February, 1879 (printed Record, pages 14 to 16), the circuit court of appeals said, in the leading opinion (printed Record, page 116):

"The act of February 20, 1879, which is recited in the bonds as authority for issuing them, definitely located this road running into Wilkes county. It does it by enacting that the convention ordinance shall be amended by adding certain words, which make it read, when so amended, as follows (see section as amended, page 115).

"Section 2 of the act of February 20, 1879, provides for convict labor being furnished for the purpose of constructing this second division; and section 4 provides *for bond subscriptions by any county in the State.* This act was invalid so far as it attempted to give power to the counties to create a debt, because it was not passed as laws for that purpose are required by the constitution of North Carolina to be passed, but that invalidity does not affect the sections of the law which deal with other matters.

Rodman *v.* Washington, 122 N. C., 39 to 42.
Russell *v.* Ayers, 180–189.
Gambell *v.* McCrady, 75 N. C., 509.
Bank *v.* Commissioners, 119 N. C., 214.

"So far as now appears, the amendment locating the road into Wilkes county, *was validly passed and became a valid law of North Carolina.*"

The position upon which the court thus rests its opinion may be summarized as follows: The act of February 20,

1879, is unconstitutional because not passed in accordance with the requirements of article 2, section 14, of the constitution, in so far *as it attempts directly and in express language to authorize Wilkes county to issue bonds* in payment of its subscription. But though the direct authority purporting to be given is void, Judge Morris held that *the other provisions enacted in the same defective way accomplished by indirection the same end by simply locating a new branch of an old road.*

This proposition, if sustained as correct, effectually annuls section 14, article II, of the constitution, the interpretation of which by the State court has been declared binding upon the Supreme Court of the United States. Almost every old charter which authorized the building of a railroad before 1868 also in terms authorized the construction of branch roads, and this ruling of the circuit court of appeals would sanction any evasion of this plain prohibition of the constitution by amendments to them enacted without a roll-call, provided such amendments purported to modify the general description of the route marked out in the charter by adding a more specific description of a branch. This would be to follow the State's interpretation only far enough to provide ready means of evading it. The court cites several North Carolina cases to sustain this extraordinary conclusion. These decisions sustain the well-established principle that an act may be constitutional in part and unconstitutional in part, but we search in vain for sanction to the proposition that one part of an act may be void as authority to create a debt *because of the defective enactment of the whole act, while another section of the act so passed confers authority on a municipal corporation to create the same debt.*

It is true that in Rodman *v.* Washington the court held

the act of 1897 for the support of graded schools in Washington "unconstitutional and void, in so far as the same purports to authorize and empower the commissioners of the town of Washington to levy a tax for any such purpose as therein set out, for that the said bill was never read three several times in each house of the General Assembly," etc. But we search the opinion in vain for a ruling that some other provision of the same act enabled the town to evade the constitutional inhibition.

In Russell *v.* Ayers, 120 N. C., 180, the court held that the section of the revenue act of 1897 which was in violation of article V, section 1, of the constitution, in that it failed to observe the equation between property and polls, was void, and that the effect of this violation of the constitution was to leave in force the ratio between poll and property established by the statute in force when the act of 1897 was ratified, though the other provisions of the act of 1897 not in violation of the constitution must be enforced as valid. But we find in the opinion no intimation that this plain violation of the organic law could have been evaded by an artful draftsman. We find nothing in Bank *v.* Commissioners, 119 N. C., 214, to warrant the deduction that an act, invalid because of the manner of its enactment, in so far as it purports to confer authority upon a corporation by its expressed language, can be construed to confer the same authority by some reference in another section of an older statute.

The case of Gambell *v.* McCrady, 75 N. C., 509, sustains the general proposition that an act may be constitutional in part and may be unconstitutional in part, but nowhere lends its sanction to such an evasion of the organic law as seems to be approved by the circuit court of appeals.

IF THE LEGISLATURE ALONE HAD THE POWER TO LOCATE THE LINE OR LINES TO BE CONSTRUCTED WEST OF WINSTON-SALEM, AND SUCH LOCATION, BY VIRTUE OF A SIMPLE ENACTMENT, WAS TO BE CONSTRUED AS AUTHORITY TO A COUNTY TO CREATE A DEBT, THEN SUCH A STATUTE WAS IN VIOLATION OF ARTICLE II, SECTION 14, OF THE CONSTITUTION, AND VOID, IF NOT ENACTED AS THEREIN REQUIRED. THE LEGISLATURE CANNOT DO INDIRECTLY WHAT IT IS PROHIBITED FROM DOING DIRECTLY. THE CIRCUIT COURT OF APPEALS FAILED TO ADVERT TO VARIOUS AMENDMENTS TO THE CHARTER OF 1868, WHICH ARE REFERRED TO IN THE RECORD. AMONG THE ACTS SO OVERLOOKED IS THE ACT RATIFIED FEBRUARY 3, 1869 (ACTS OF 1868–'69, CHAPTER 62), ENTITLED "AN ACT TO REPEAL AN ACT ENTITLED AN ACT TO AMEND AN ORDINANCE OF THE CONVENTION ENTITLED AN ORDINANCE TO INCORPORATE THE NORTHWESTERN NORTH CAROLINA RAILROAD COMPANY, AND TO SUBSTITUTE THE FOLLOWING PROVISIONS FOR SAID ACT."

The second section of the last-named act provided for State aid to the first division of the road from Winston-Salem, for the Mount Airy division, and "for the purpose of aiding in the construction of the Yadkin Valley division of said railroad, running from Salem-Winston by way of Louisville, thence by way of Yadkinville, in the county of Yadkin, or within one and a half miles thereof." By this act it was provided that the State should loan the company twenty thousand dollars a mile to construct the road by way of Yadkinville. This act has never been repealed, in so far as it provides for a different route from Salem-Winston, westward. Some of the other acts referred to in the record and

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printed in the brief of counsel for appellant in the circuit court of appeals are the following, to wit:

Acts of 1869–'70, chapter 100.
Acts of 1870–'71, chapter 178.
Acts of 1871–'72, chapter 25.
Acts of 1871–'72, chapter 47.

The circuit court of appeals failed to examine thoroughly the decisions of the supreme court of North Carolina, as will appear from comparing extracts from its opinion with the decisions of the State court.

First. The circuit court of appeals said in the opinion (Record, page 117):

"Has the supreme court of North Carolina ever interpreted this amendment and declared its meaning? We do not find that it has."

In Commissioners *v.* Call, the majority opinion does not place the decision upon the contention that Wilkes county is not in the same category with Forsyth county, but upon a want of power affecting both alike, and upon the fact that an invalid enactment is recited on the face of the Wilkes County bonds as authority to issue them.

Compare the foregoing with the following, from Commissioners *v.* Call, 123 N. C., at page 313:

"That said ordinance cannot be relied on to support the validity of the bonds at issue is apparent for several reasons. *First, we do not see that any authority whatever is given, or attempted to be given, in either of these sections, to Wilkes county to subscribe to the capital stock of this company.*"

It thus appears that the State court rested its opinion, first of all, upon the ground *that no power was given to Wilkes county, not upon a want of power affecting Wilkes and Forsyth alike*, though it is true that the testimony offered by the defendant in the Belo case was excluded, and the supreme court of North Carolina sustained the ruling below, *because the act of August 11, 1868* (which, in the light of new evidence—extracts from the legislative journals—has been since declared void), *rendered that evidence irrelevant and immaterial.* The supreme court, in the extract given above, laid down at the outset the proposition that no authority had been granted to Wilkes county, not that both counties are in the same category. Thus the court of appeals misinterprets and, by inadvertence, mistakes the grounds upon which the opinion (in Commissioners *v.* Call) is made to rest.

Second. The opinion of the majority of the circuit court of appeals, in further support of the views that the act of February 20, 1879, vested authority in Wilkes county, said:

"The original charter ordinance of 1868, having given authority to construct a railroad by way of Salem and Winston, in Forsyth county, to some point on the northwestern boundary line of the State, and to construct branches, and the legislature having afterwards validly enacted that one of these branches running towards the northwestern boundary line of the State, to be called the second division, should be constructed by way of Wilkes county, there would seem no sound reason for construing the legislation so as to deny to Wilkes county that power to issue bonds which the supreme court of North Carolina had in 1877 held that Forsyth county had."

As I have already attempted to show, the legislature could not evade the constitution by giving indirectly to a county power to create a debt when it was prohibited by article II, section 14, from doing so directly. *To declare the amendment of 1879 so far valid as to vest Wilkes county with authority to create a debt by marking out the route of the second division in section 1 of the act, though section 4* (printed Record, pages 14, 15) is to annul the constitution and evade the decisions of the highest courts—State and Federal courts.

Third. The circuit court of appeals said in effect that there is nothing in the decisions of the supreme court of the State to sustain the late statement of that court that it was the policy of the framers of the constitution of 1868 and of the legislature, which gave its provisions full effect, to restrict counties and other municipal corporations in creating debts. That court said:

"It is urged in argument that the policy of North Carolina was declared by the constitution of 1868 to be hostile to permitting counties to bond themselves in order to subscribe to railroads which passed near or through them. We do not think this anywhere appears."

In discussing the Code, sections 1996 to 2000, in Commissioners *v.* Snuggs, 121 N.C., at page 402, Justice Montgomery said, for the court:

"*It is most reasonable to conclude that the policy and purpose of both the constitutional provision and the statute were the same, the only difference being that in case of State aid no approval by a vote of the people was required, while a majority vote of the people was required in case of county aid.* The object of the statute must have been to provide by a *general act means by which the counties, without special* legislation for

each county by separate bills, might be *enabled to complete unfinished railroads in which the counties had a pecuniary interest.* At the time of the enactment of the statute 1868–'69, and always since that time, any county of the State, duly observing the limitations of section 7, art. VII, of the constitution, and under an act passed according to the requirements of section 14, art. II, of the constitution, could and can subscribe to the capital stock of a railroad company, whether unfinished or to be begun."

In support of the declaration of the court, which the circuit court of appeals say, "We do not think anywhere appears," we respectfully submit a portion of the opinion of Chief Justice Pearson, in University *v.* Holden, 63 N. C. (filed at June term, 1869), beginning at page 413:

"The evil which the constitution seeks to prevent is not that of giving aid to individuals or corporations in the construction of railroads, but that of contracting *new* debts on the part of the State, the existing debts being almost too heavy to bear, and the credit of the State tottering under the load. A construction by which new debts my be contracted on a larger scale than one expressly prohibited, is not admissible upon any principle of the law. As this is a deduction from Galloway *v.* Jenkins, in which the court was divided, *I will put my conclusions also on the construction of all the provisions of art. V.*"

III. The act under consideration is in violation of the constitution in this: The tax levied by it disturbs the proportion which, by the constitution, capitation tax must bear to the tax on the value of the property, to wit: "The *tax on a poll should be equal to the tax on three hundred dollars' worth of property.*" Here we have the proportion. Then follows a provision: "The State and county tax combined shall never

exceed *two dollars on the head*," and the necessary effect is that the State and county tax on the value of property shall never exceed two dollars on three hundred dollars' worth of property; and the effect also is that if the tax on a poll is less than two dollars, then the tax on three hundred dollars' worth of property must be less in the same ratio. In other words, the tax on the poll is "the standard" by which the tax on property is levied.

Under two dollars, the power to levy a poll tax for State purposes is unlimited; this interest needs no protection, for it has a full representation in the General Assembly.

Counties are protected by section 7, which provides:

"Taxes levied for county purposes shall be levied in like manner with the State taxes, and shall never exceed double of the State tax, except for a special purpose, and *with the special approval of the General Assembly*."

Cities, towns, and townships are protected by article VII, section 7, which provides:

"No debt shall be contracted, nor shall any tax be levied, except for necessary expenses, unless by a vote of a majority of the qualified voters therein."

The only remaining interest is that of *property-holders in respect* to State and county taxes. This interest is protected by the equation fixed between capitation tax and the tax on property. A statute which disturbs this equation breaks down the safeguard thrown around property by the constitution. If it can be done to the extent of one-hundredth of 1 per cent., it may be done to the extent of one-tenth, and there is no limit.

It was said in the argument that this equation applies only to taxes levied for current expenses of the State and counties, and has no reference to taxation necessary to pay interest on the public debt or the tax to be levied to pay the interest on any new debt.

1. I agree that if, under this equation, carried to its limits, the amount is not enough to meet current expenses and also to pay interest on the public debt, then for the excess needed it is not only within the power, but it is the duty of the General Assembly to disregard the equation, for this protection to property must be taken to be subject in the injunction "to maintain the honor and good faith of the State untarnished in regard to the public debt (art. I, sec. 6), and by section 4 of the article under consideration it is ordained:

"The General Assembly shall, *by appropriate legislation and adequate taxation*, provide for the payment of the interest on the public debt, and after 1880 it shall lay a special annual tax, as a sinking fund, to discharge the principal."

I do not adopt the entire position taken by Mr. Haywood, that a specific tax is meant as a tax on land by the act or on horses and cattle by the head. It is enough to admit that this tax is to be independent of the equation, as in *section 7 a tax for special county purposes, with the special approval of the General Assembly, may be levied without reference to the equation.*

I do not agree to the position that the tax required by article —, section 5, to be levied to pay the interest on any new debt, is not subject to equation, and that the powers to tax property *in reference to new debts are unlimited*, save by the

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discretion of the General Assembly. There is nothing, as we have seen there is, in the case in regard to taxation to meet the interest and principal of the existing debt, to take this taxation out of the equation. *Its being called a special tax cannot have the effect, for section 6 requires that every act shall state the special object to which the tax is applied. On the contrary, it is included in the equation by every rule of construction.*

This fixed equation between poll tax and property tax gives significance to the provisions of the first clause of section 5:

"No new debt shall be contracted in behalf of the State, *unless in the same bill a special tax is levied to pay the interest annually.*"

Compare the foregoing with the discussion in the same volume in Galloway *v.* Chatham Railroad Company, to which Chief Justice Pearson refers in the foregoing citation from University *v.* Holden, and it will appear that the court, in the two opinions, for the purpose of construction, discussed the provisions of article V of the constitution, and the question whether these provisions restricted the State or its governmental subdivisions.

In matters of construction, the court is not to confine itself to the particular section; but *it is to consider the entire instrument in order to find the general purpose and the object arrived at.*

"To maintain the honor and good faith of the State untarnished, the public debt regularly contracted before and since the rebellion shall be regarded as inviolable, and never to be questioned" (art. I, sec. 6).

"No law shall be passed to raise money on the credit of

the State, or to pledge the faith of the State directly or indirectly for the payment of any debt, etc., unless the bill is *read three times on three different days*, and unless the *yeas and nays on the second and third readings of the bill shall have been entered on the journal*" (art. II, sec. 16).

"*The General Assembly shall, by appropriate legislation, and by adequate taxation, provide for the prompt and regular payment of the interest on the public debt, and, after the year 1880, it shall lay a specific annual tax upon the real and personal property of the State, and the sum thus realized shall be set apart as a sinking fund, to be devoted to the payment of the public debt*" (art. V, sec. 4).

But the court is also required to look at the previous legislation by which the evil calling for these cumulative restrictions was caused, and this will furnish a key to the meaning, and open it so plainly to view "that he who runs may read."

"The war debt has been put out of the way by a dash of the pen. It will be found that most of the public debt was incurred in three modes: *First, by subscribing for stock in railroad and navigation companies, and issuing bonds to pay for the stock, the State becoming a member of the corporation; this is the heaviest item, and amounts to, say eight millions of dollars; second, by issuing bonds of the State, and exchanging such bonds for a like amount of bonds of the corporation, the State not becoming a stockholder, and taking a collateral security of more or less value—this is the next heaviest item, and amounts to about three millions of dollars; third, by endorsing the bonds to corporation and taking a mortgage on some other collateral security—this amounts to about two millions.*"

It is a part of the judicial history of the State that the counties had been subscribing to the capital stock of rail-

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road companies, and hence the provisions of the constitution (art. II, sec. 14; art. V, secs. 1, 6, 7; art. VII, sec. 7), and of the act of 1869 (Code, secs. 1996 to 2000), which left counties, like the State, at liberty by a general provision of law to protect investments made before 1868, but subject to restrictions similar to those imposed on the State as to incurring other obligations. Did not the citizen need even greater restrictions to protect him against municipal than State legislation?

Galloway *v.* Chatham Railroad Company, 63 N. C., pages 152, 153, 154.

By comparing the citation given above, it will appear that for thirty years the supreme court of the State has been declaring that the law-makers of 1868 intended to restrict the legislation of municipalities as well as the General Assembly, so that neither could lend its credit without the approval of the voters interested, except to finish a railroad in which it had invested before April 24, 1878.

THE ORDINANCE OF 1868 DID NOT PLACE WILKES AND FORSYTH IN THE SAME CATEGORY.

Though the Supreme Court had, in Wilkes County Commissioners *v.* Coler, 180 U. S., at page 532, mentioned the act of 1879 as a statute "*which has been adjudged never to have become a law of the State*," drawing the deduction that such a law could confer by a power which its direct provisions were ineffectual to grant.

In opening the discussion as to the general authority granted by the ordinance of 1868, Judge Morris, speaking for the majority of the court, said:

"The question now to be passed upon, therefore, is whether, independent of the invalid legislative *enactment attempted to be passed subsequent to the convention ordinance of March 9, 1868, Wilkes county had the power under the ordinance to submit the stock subscription to the vote of the qualified voters, and upon authorization by a majority of the votes to issue the bonds and levy taxes to pay the interest and principal.* If Wilkes county was in the same category with Forsyth county, the supreme court of North Carolina adjudged in the case of Belo *v.* Commissioners, 76 N. C., 489 (1877), that the power was conferred by the ordinance of the convention, and this ruling remained unaffected by any subsequent adjudication of the supreme court of North Carolina, and until these bonds were issued."

The argument of the court to which we have adverted shows that "*the invalid legislative enactment attempted to be passed subsequent to the convention ordinance of March 9th*, 1868," seems to have been an afterthought, as in the foregoing extract it seemed to be justly conceded that the act of 1879 was not a law that could confer any authority on the county of Wilkes.

The first section of the ordinance of 1868 made "*Salem and Winston, in Forsyth county,*" *the only fixed and certain point on the proposed road, and Forsyth county* was the only county through which the ordinance required the proposed road to be built (Record, page 10).

Section 13 provided that the company should have power to construct branches of said road, one of which shall run from the towns of Winston-Salem, by way of Mount Airy in Surry county, to line of the State of Virginia (Record, page 13).

Leaving out of view the "legislative enactment attempted to be

passed"—the act of 1879—*Wilkes county was left by the charter in the same category, not with Forsyth (in which the initial point of the main line is located by the charter), but with every county in the State other than Forsyth.*

If the charter conferred this authority on Wilkes county, it would follow that the company might have projected branches from any point in the main line—for instance, Greensboro, or Winston-Salem, or any intermediate point thereon—to any point of the Atlantic coast, or on the borders of either Virginia, Tennessee, or South Carolina; and by virtue of locating such line the act of the company, not of the legislature, would vest authority not only in every county "*through which*," but in every county "near which" such line would pass.

The supreme court of North Carolina had, by a line of decisions running back for about a century before the bonds were issued, held that the word "near" was too indefinite to fix and determine location. Applying the principle that the court had adjudged that a call for a stake, an indefinite point, in a known line, by a certain course, should be extended beyond the distance given so as to intersect with such line, while if the same call had been for a stake "*near*" such line, it should not be run or extended beyond the distance called for, because the word "*near*" designated no particular point.

Cansler *v.* Fife, 50 N. C. (5th Jones), 424, 427.
Mizzell *v.* Simmons, 79 N. C., 182.

In Cansler *v.* Fife (50 N. C., at pages 427, 428) the court said:

"In respect to the question as to Rickman's line, we also

concur with his honor. There was no evidence by which the jury could locate that line; supposing it to have been located, *the call for a Spanish oak, in or near* Rickman's line, *would not control course and distance*, because the Spanish oak could not be found, *and the word 'near' is not sufficiently certain. How near? One pole or fifty? Either would satisfy the term 'near.'*

Harvy *v.* Goodman, 1 Dev. and Bat. Rep., 76."

In attempting to show that the line, *which is called a branch in the void act of 1879*, is built as the second division, leaving out of view said void act, the court (at page 116 of the record) said:

"The piece of railroad for which the bonds in suit were issued does run from Salem and Winston, in the general direction of the northwestern boundary line of the State, and, indeed, *it seems evident that such a railroad, to some point in the northwestern boundary line of the State, must pass near or through Wilkes county.*"

Construing the ordinance "*alone*," the court, in order to sustain the validity of the bonds, was driven to the necessity of holding as a matter of judicial knowledge that a line through an adjacent county to Wilkes would be within the meaning of the ordinance (the charter) near to Wilkes county. "How near; one mile or fifty?" (50 N. C., page 428). Yet the law of North Carolina, before 1868, in October, 1889, was that a jury must be instructed that the word "near" was too indefinite to determine location. Yet the court, in Wilkes County Commissioners *v.* Coler, 180, 506, 531, said:

"It is settled doctrine of this court 'that the question arising in a suit in a Federal court of the power of municipal corporations to make municipal securities,' is *to be determined*

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by the law, as judicially declared by the highest court of the State, when the securities were issued, and that the rights and obligations of the parties accruing under such a state of the law, would not be affected by a different course of judicial decision subsequently rendered any more than by subsequent legislation."

"*When the securities were issued*" (*in October, 1889*) "the law of the State, as judicially declared by the highest court of the State" for a century, was that the word "near" was too indefinite, as a descriptive term, to fix and determine location, and consequently that the court could not say judicially, nor allow a jury to determine, that near a county means in an adjacent county or in a county between which and Wilkes there was only one county intervening.

Apparently doubting whether the position that the charter route must pass near Wilkes county in order to reach the North Carolina boundary line of the State, and that, therefore, the charter would clothe Wilkes county with authority as a county near the proposed line, the circuit court of appeals, in the same paragraph, fell back upon the position that "the invalid legislative enactment attempted to be passed"—"the act of February 20, 1879, which is recited in the bonds as authority for issuing them, definitely located the road running into Wilkes county." In explanation the court said further (Record, page 116):

"It does it by enacting, that section 13, of the convention ordinance, shall be amended by adding certain words, which make it read when so amended as follows:

"So far as now appears, the amendment locating the road into Wilkes county, was validly passed and became a valid law of North Carolina."

If the last paragraph means that section 4 (page 15 of the record) is valid, then it overruled the supreme court and contradicted its own statement in a previous paragraph that the attempted legislation was void.

If the court intended to rest its ruling upon the authority of the ordinance alone, it was inconsistent and illogical to fall back upon the later act.

If the court meant to assert the position that the authority was conferred by the act of 1879 as an amendment, then that act would be valid as a grant of power by virtue of the amendment to the charter in section 2, but void as a grant of power by virtue of section 4.

The constitution (art. II, sec. 14) provides that "No law shall be passed * * * to pledge the faith of the State, *directly or indirectly*, for the payment of any debt, or to impose any tax upon the people of the State, *or to allow the counties, cities or towns to do so*, unless the bill for the purpose," etc.

How, in the face of this prohibition, could Wilkes county be vested by the act of 1879 with authority which had not been previously granted, if that act was "no law"?

The circuit court of appeals sought to correct the supposed mistake of the supreme court in Wilkes County Commissioners *v.* Coler, in declaring that the act of 1879 had never become a law of the State for any purpose, by holding that the legislation had indirectly authorized a county to pledge its faith, though that section of the constitution (it would seem needlessly) provided that such pledges should be made, neither directly nor indirectly.

The petitioners have attempted only to show errors in the leading opinion of the court, and have not alluded to numerous errors of law and mistakes of fact which they think are contained in the concurring opinion, hoping to do this upon a final argument of the cause.

A. C. AVERY,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 247.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY AND JOHN H. JOHNSON, SHERIFF AND EX OFFICIO TREASURER OF WILKES COUNTY, *Appellants,*

against

W. N. COLER & COMPANY, *Appellees.*

BRIEF OF A. C. AVERY, COUNCIL FOR APPELLANTS.

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SUMMARY OF FACTS.

This suit was brought by original bill in the Circuit Court for the Western District of North Carolina, on the 22d day of February, A. D. 1899, to restrain the Board of Commissioners of Wilkes County and the *Ex Officio* Treasurer of said county from disposing of a sum of money collected to meet the interest on certain bonds of said county, the said Treasurer having been theretofore enjoined by a decree of the State Court from applying said fund to the payment of interest on said bonds, which had theretofore been declared invalid by the Supreme Court of North Carolina, in *Commissioners v. Call,* 123 N. C., 308. The temporary restraining order was granted (see printed record, page 10), and upon the hearing a decree was entered on the 14th of April, A. D. 1899, by Hon. Thomas R. Purnell, presiding in the Circuit Court for said District (see record, page 96), from which the respondents there, appellants here, appealed to the Circuit Court of Appeals for the Fourt Circuit.

The action in the State Court, entitled *Commissioners of Wilkes County et al. v. Clarence Call, Sheriff, and Ex Officio*

Treasurer of Wilkes County et al., was instituted by summons on the 23d day of December, 1897 (see record, page 32), the plaintiffs alleging in their complaint that the defendant Call was collecting and had collected certain special tax funds, which he had been paying over to himself in the capacity of Treasurer of said county, and which funds the plaintiffs were informed that he had been paying over as Treasurer to meet the interest accruing on said county bonds, and that the plaintiffs were informed that he would continue to so apply said special tax as collected, and that, if he should so apply said fund, the county would be left without remedy, under the decision of the Supreme Court of North Carolina in *Board of Education v. Commissioners*, 113 N. C., 379, at pages 388, 389 (see record, section 14 of complaint, page 37), and also record, page 74, paragraph 3, of application of defendants for appointment of receiver by State Court.

In the State Court, upon the hearing before Starbuck, Judge, on February 18, 1888, the defendant Treasurer was restrained from paying over any funds coming into his hands in satisfaction of principal or interest on said bonds (see record, page 69). At the next term of the Superior Court of Wilkes County, J. M. Welborn and J. M. Turner, as bondholders, were allowed to make themselves parties defendant (see record, page 69), and entered a motion to vacate the said order of injunction theretofore granted by Starbuck, Judge, which motion was refused upon the hearing, and said defendants Welborn and Turner appealed to the Supreme Court of North Carolina (see record, pages 71, 72, and 123 N. C., 308).

After the adverse decision upon their appeal, 123 N. C., 308, the defendants Welborn and Turner filed a petition for Writ of Error, and the case of Turner and Wellborn, plaintiffs in error, against the Board of Commissioners of Wilkes County was heard in the Court of the United States, 173 U. S., 461.

PROCEEDINGS IN THE CIRCUIT COURT OF APPEALS.

Before the appeal to the Circuit Court of Appeals for the Fourth Circuit, that Court had decided the case of *Commission-*

ers of Stanly County v. Coler, 96 Fed. Rep., 284, involving, in common with this appeal, the question whether sections 1996 to 2000 of The Code of North Carolina, empowered the county to create the bonded debt.

The Circuit Court of Appeals certified certain questions to the Supreme Court of the United States (see record, page 108), and those questions were answered in the opinion, *Wilkes County v. Coler*, 180 U. S., 506.

The Supreme Court of the United States did not pass upon two questions involved in this case:

First, Whether The Code, sections 1996 to 2000, embodying the general law, empowered Wilkes County to issue the bonds.

Second, Whether the charter of the Western North Carolina Railroad Company, as amended up to the time when the bonds were issued, empowered Wilkes County to create the bonded debt.

The sections of The Code, 1996 to 2000, are as follows:

"SEC. 1996. The boards of commissioners of the several counties shall have power to subscribe stock to any railroad company or companies, when *necessary to aid in the completion of any railroad in which the citizens of the county may have an interest.*"

"SEC. 1997. The board of commissioners of any county proposing to take stock in any railroad company, shall meet and agree upon the amount to be subscribed, and if a majority of the board shall vote for the proposition, this shall be entered upon the record, which shall show the amount proposed to be subscribed, to what company, and whether in bonds, money or other property, and thereupon the board shall order an election to be held on a notice of not less than thirty days, for the purpose of voting for or against the proposition to subscribe the amount of stock agreed on by the board of county commissioners. And if a majority of the qualified voters of the county shall vote in favor of the proposition, the board of county commissioners, through their chairman, shall have power to subscribe the amount of stock proposed by them and submitted to the people, subject to all the rules, regulations and restrictions of other stockholders in such company or companies: *Provided*, that the

counties, in the manner aforesaid, shall subscribe from time to time such amounts, either in bonds or money, as they may think proper."

"SEC. 1999. In case the county shall subscribe the amount proposed in bonds, the board of commissioners shall have power to fix the rate of interest, not to exceed the rate of eight per cent, when the interest on said bonds shall be payable, and at what place, and shall also fix the time and place of paying the interest, and shall also determine the mode and manner of the same; and also to raise by taxation, from year to year, the amount necessary to meet the interest on said bonds."

"SEC. 2000. The taxes authorized by the three preceding sections to be raised for the payment of interest or principal, shall be collected by the sheriff in like manner as other State taxes, and be paid into the hands of the county treasurer, to be used by the chairman of the board of county commissioners as directed by this chapter."

THE CHARTER OF THE NORTHWESTERN NORTH CAROLINA RAILROAD COMPANY was ratified on the 9th day of March, 1868. The charter, and all amendments thereto enacted up to the time when the bonds were issued, are as follows (see printed record, pages 10 to 18, inclusive):

1.—EXHIBIT "A."

An ordinance to incorporate the Northwestern North Carolina Railroad Company.

"SECTION 1. Be it ordained by the people of North Carolina in convention assembled, and it is hereby ordained by authority of the same: That for the purpose of constructing a railroad of one or more tracts, from some point on the North Carolina Railroad between the town of Greensboro, in Guilford County, and the town of Lexington, in Davidson County, running by way of Salem and Winston, in Forsyth County, to some point in the northwestern boundary line of the State, to be hereafter determined, a company is hereby incorporated under the name and style of the Northwestern North Carolina Railroad Company,

with a capital stock of two millions of dollars, which shall have a corporate existence as a body politic for the space of ninety-nine years, and by that name may sue and be sued, plead and be impleaded, in any court of law and equity in the State of North Carolina; and may have and use a common seal, and shall be capable in law and equity of purchasing, holding, leasing and conveying estates, real and personal, and mixed, and acquiring the same by gift or devise, so far as may be necessary for the objects herein contemplated, and no further; and said company may enjoy all other rights and immunities which other corporate bodies may lawfully exercise, and may make all necessary by-laws and regulations for its government not inconsistent with the Constitution and laws of the State of North Carolina and of the United States.

"Sec. 2. Be it further ordained, That the capital stock of said company may be created by subscriptions on the part of individuals, corporations and counties, in shares of one hundred dollars.

"Sec. 3. Be it further ordained, That books of subscription to the capital stock of said company shall be opened by the following commissioners, to-wit, I. G. Lash, J. A. Vogler, H. W. Fries, in the town of Salem; and Thomas J. Wilson, Joseph Masten, R. A. Wilson, in the town of Winston, and by such other persons and in such other places as the aforesaid commissioners may direct; and that ten days' notice of the opening of said books shall be given in one or more newspapers of this State; and, furthermore, that the said commissioners, or any four of them,

may, at any time after said books have been kept open for
13 the space of thirty days, and the sum of thirty thousand

dollars has been subscribed to the capital stock of said company, and five per cent paid thereon, have power to call together the subscribers to said stock for the purpose of completing the organization of said company; and the said subscribers shall be, and are hereby declared, incorporated into a company by the name and style of the Northwestern North Carolina Railroad Company; and the said company may, from time to time, receive other subscriptions to its capital stock as it may deem proper.

"Sec. 4. Be it further ordained, That the company may hold

annual meetings of its stockholders, and oftener if necessary, and at its organization and the annual meetings subsequent thereto, ten directors shall be elected to hold office for one year, or until their successors shall be elected; and any of said meetings shall have power to make or alter the by-laws of the company: *Provided,* that in all such meetings of the stockholders a majority of all the stock subscribed shall be represented in person or by proxy, which proxy shall be verified in the manner prescribed by the by-laws of the company; and each share thus represented shall be entitled to one vote on all quesitons; and that it shall be the duty of the directors of the company to elect one of their own number as president of said company, and to fill all vacancies in their board.

"SEC. 5. Be it further ordained, That after the organization of said company and the election of the president and other necessary officers, the officers so elected shall proceed, under the advice of the directors, to locate the eastern terminus of the Northwestern North Carolina Railroad, and shall proceed to construct said road, with one or more tracks, as speedily as practicable, in sections of five miles each, to the towns of Winston and Salem, in Forsyth County, which portion of said railroad, when completed, shall constitute its first division: *Provided,* that if the distance from the nearest section to the towns of Winston and Salem be less than five miles, the same shall be considered a section.

"SEC. 6. Be it further ordained, That said company shall have the same power to call for and enforce the payment of stock subscribed as was heretofore granted to the North Carolina Railroad Company, by their charter of incorporation; and shall have power to condemn land for the use of the company, when a contract of purchase can not be made with the owner
14 thereof, to the same extent and in the same manner and under the same rules, regulations and restrictions as the said North Carolina Railroad Company were authorized to do by their act of incorporation.

SEC. 7. Be it further ordained, That all contracts made and entered into by the president or superintendent of the company, whether with or without seal, shall be binding upon the com-

pany; and the president shall, under the instruction of the board of directors, issue certificates of stock to the stockholders, which shall be transferable in the manner prescribed by the by-laws of the company.

"SEC. 8. Be it further ordained, That whenever the president and chief engineer of said company shall certify to the Governor of the State that the grading of any of the sections of said road, as mentioned in section 5 of the ordinance, is completed and ready for the superstructure, he shall direct the public Treasurer of the State to loan, in behalf of the State, to the said company, the sum of fifty thousand dollars in coupon bonds; and in like manner the Governor will direct similar loans to be made to the company upon the completion of the grading of each and every section, until the first section is graded entire; and said company shall set aside the receipts of the road over and above its annual expenses as a sinking fund to pay the said debts and interests, the whole amount of said debt and interest to be paid before the said company shall order any dividends on the stock of the company; and that said sinking fund so produced shall be semi-annually paid into the public treasury.

"SEC. 9. Be it further ordained, That no part of said loan or bonds shall be delivered to said company until the president and directors thereof shall execute and deliver to the Governor of the State a mortgage on the entire road and its property, conditioned to save the State harmless against the loss of both principal and interest of said loan.

"SEC. 10. Be it further ordained, that the coupon bonds loaned as aforesaid, shall be signed by the Governor, countersigned by the Treasurer, and sealed with 'the great seal of the State,' bearing six per cent interest, the principal payable at the end of thirty years from the date thereof, and the coupons for the interest payable semi-annually in such form as the public Treasurer may direct.

"SEC. 11. Be it further ordained, That the company may have the exclusive right of transporting persons and freight upon said road, at such rates of charges as the board of directors may fix, and may have power to farm or lease the same to any person or persons or corporation.

"SEC. 12. Be it further ordained, That the stockholders of said company may pay the stock subscribed by them either in money, labor or material for constructing said road, as the board of directors may determine, and that all counties or towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company, for the government of such towns and counties as are now allowed to subscribe to the capital stock of said company.

"SEC. 13. Be it further ordained, That the company shall have power to construct branches of said road, one of which shall run from the towns of Winston and Salem, by way of Mount Airy, in Surry County, to the line of the State of Virginia.

"SEC. 14. Be it further ordained, That this ordinance shall be in force from and after its passage.

"Ratified this 9th day of March, A. D. 1868.

"CALVIN J. COWLES, *President.*

"T. A. BYRNES, *Secretary.*"

2—EXHIBIT "B."

An act ratifying and confirming the charter of the Northwestern North Carolina Railroad Company.

"SECTION 1. The General Assembly of North Carolina do enact, that an ordinance entitled "An ordinance to incorporate the Northwestern North Carolina Railroad Company," ratified the 9th day of March, A. D. 1868, be, and the same is hereby, re-enacted, ratified and confirmed, and all acts and things heretofore done under the provisions of said ordinance are hereby ratified and confirmed.

"SEC. 3. That all the rights, powers and authorities conferred or purporting to be conferred by said ordinance incorporating the Northwestern North Carolina Railroad Company on the Justices of the Peace of Forsyth County, or of the County Court of said county, be, and the same are hereby, conferred on the Commissioners of said county.

"SEC. 3. That the Commissioners of the county of For-
16 syth are hereby invested with full powers and authority to levy, from time to time, such tax as may be sufficient to pay the subscriptions made by said county to the capital stock of the Northwestern North Carolina Railroad Company, and any interest due thereon, or to liquidate any debt created by said county in borrowing money to pay such subscription stock.

"Ratified the 11th day of August, A. D. 1868."

(Private Laws of the Special Session of 1868, of the General Assembly of North Carolina.)

3.

CHAPTER 26.

"An Act entitled an act to amend an ordinance of the Convention, entitled 'An ordinance to incorporate the Northwestern North Carolina Railroad Company.'

"The General Assembly of North Carolina do enact:

"SECTION 1. That for the purpose of aiding in the construction of the Northwestern North Carolina Railroad from Salem, in Forsyth County, to Mount Airy, in Surry County, whenever the president and chief engineer of the company shall certify to the Governor of the State that five miles of this division of the road from Salem to Mount Airy shall be graded and ready for the superstructure, and that when one hundred thousand dollars solvent additional security shall have been taken, and five per cent of the same shall have been paid to the treasurer of the company, the Governor shall direct the Public Treasurer of the State to loan to the company the sum of ten thousand dollars per mile in coupon bonds, principal payable at the end of thirty years, and in like manner the Governor shall direct the Public Treasurer to loan the sum of ten thousand dollars per mile to said company for each and every section of five miles, when the presi—

"SEC. 2. That no part of said loan or bonds shall be delivered to said company until the said company shall have executed and

delivered to the Governor of the State a first mortgage of entire road, with all its property and franchises, so conditional that if the said company shall fail to pay the interest on said debt semi-annually, or shall fail to set apart annually for a sinking fund to pay the principal of said debt, all the receipts of the road over and above its annual expenses, after the time when the principal shall have been paid out of the sinking fund already provided for in said ordinance to secure payment of a loan therein directed to be made, then, and in default of either of these conditions, the State may foreclose the mortgage and enter upon and take possession of the road and all its property, and sell the same for the payment of said debt and interest.

"SEC. 3. That portion of the Northwestern North Carolina Railroad extending from Salem to Mount Airy shall be known as the second division of the Northwestern North Carolina Railroad.

"SEC. 4. This act shall be in force from and after its ratification.

"Ratified the 21st day of August, A. D. 1868."

4.

(Acts of 1868-'69, Chapter 32.)

CHAPTER 32.

"An Act to repeal an act entitled an act to amend an ordinance of the Convention, entitled an ordinance to incorporate the Northwestern North Carolina Railroad Company, and to substitute the following provision for said act:

"The General Assembly of North Carolina do enact:

"SECTION 1. That for the purpose of aiding in the construction of the *Mount Airy division* of the Northwestern North Carolina Railroad, from Salem, in Forsyth County, to Mount Airy, in Surry County, and *the first division of said road from Greensboro to Salem and Winston,* when the president and chief engineer of said company shall certify to the Governor that one hundred and fifty thousand dollars in solvent subscriptions have been taken in said company, and five per cent shall have been

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paid into the treasury of said company on said subscriptions, the Governor of the State shall direct the Public Treasurer to loan the said company the sum of twenty thousand dollars per mile, in coupon bonds of the State, on the aforesaid divisions, bearing six per cent interest per annum, payable semi-annually, principal payable at the end of thirty years, said bonds to be of the denomination of one thousand dollars, signed by the Public Treasurer, countersigned by the Governor, and bearing the great seal of the State.

"SEC. 2. *That for the purpose of aiding in the construction of the Yadkin Valley division of said railroad, running from Salem and Winston, by way of Lewisville, thence by way of Yadkinville,* in the county of Yadkin, or within one and a half miles thereof, thence up the valley of the Yadkin to the foot of the Blue Ridge, in the county of Caldwell, the sum of twenty thousand dollars per mile on said division shall be loaned by the State to said company, to be paid in the coupons of the State at par, to be issued of the same denomination and in the same manner as provided for issuing bonds mentioned in the first section of this act, as soon as the president and chief engineer of said company shall certify to the Governor of the State that one hundred thousand dollars in solvent subscriptions shall be made on said valley division to the capital stock of said company, and five per cent paid thereon to the company.

"SEC. 3. That no part of said loan or bonds shall be delivered to said company until said company shall have executed and delivered to the Governor of the State a first mortgage of the entire road, with all its property and franchises, so conditioned that if the said company shall fail to pay the interest on said debt semi-annually, or shall fail to set apart annually, for a sinking fund, to pay the principal of said debt, a dividend of three and one-third per cent on the stock of said company, if so much shall be declared per annum, over and above its annual expenses, after the time when the principal shall have been paid out of the sinking fund, already provided for in said ordinance, to secure the payment of a loan therein directed to be made, then, and in default of either of these conditions, the State may foreclose the mortgage and enter upon and take possession of the

road and all its property, and shall sell the same for the payment of said debt and interest.

"SEC. 4. That for the purpose of raising a sum sufficient to pay the interest of the bonds of the State herein authorized, at the rate of twenty thousand dollars per mile of said road, a special tax of one-twentieth of one per cent of the real and personal property of the State, to be annually levied and collected, until the maturity of said bonds, is hereby imposed; and the residue of the fund derived from said tax for the payment of interest on the aforementioned State bonds, if any, shall be used as a sinking fund for the special redemption of the bonds of the State to said company to be issued.

"SEC. 5. That the company, notwithstanding any other provisions of this act or the charter of said company, shall have the right, at any time, to pay in any of the bonds or other indebtedness of the State, at par, the obligations and liabilities of the company to the State, arising from the foregoing loans or any other loans of State bonds.

"SEC. 6. *Provided*, that on or before the day upon which the first coupon of the bonds authorized to be issued by this act shall become due, the president of the above named railroad company shall pay to the Public Treasurer, either in cash or in matured coupon bonds upon which the Public Treasurer is made to pay the interest under this act, the sum of sixty thousand dollars; and on or before the day upon which the second coupon of the bonds authorized by this act shall become due, the president of the above named railroad company shall pay, in like manner, the sum of sixty thousand dollars; and on or before the day upon which the third coupon as aforesaid shall become due, the president above named shall pay to the Public Treasurer, in like manner, the sum of forty thousand dollars; and on or before the day upon which the fourth coupon as aforesaid shall become due, the president above named shall pay to the Public Treasurer, in like manner, the sum of twenty thousand dollars.

"SEC. 7. *Provided further*, that of the bonds authorized to be issued under this act, three hundred and sixty thousand dollars shall be retained by the Public Treasurer as collateral security for the faithful performance of the conditions of the pre-

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ceding section; and that upon the payment of the first sixty thousand dollars as aforesaid, the Public Treasurer shall be authorized to deliver to said railroad company one hundred and twenty thousand dollars of the above named three hundred and sixty thousand dollars of bonds; and upon the payment of the succeeding amounts named in said section, the Public Treasurer is authorized to deliver bonds to the amount of double the sum paid, until all said bonds are delivered to said railroad company: *Provided also,* that at the expiration of two years from the date of the first coupon of the bonds authorized in this act, the Public Treasurer shall be authorized to issue said railroad company an additional amount of bonds equal at their par value to the amount paid in cash by said company in behalf of the State according to the provisions of section six of this act, said bonds to be in all respects similar to those authorized to be issued by this act.

"SEC. 8. That all laws and ordinances coming in conflict with the foregoing provisions of this bill are hereby repealed.

"SEC. 9. This act shall be in force from and after its ratification.

"Ratified the 3d day of February, A. D. 1869."

5.

(Acts 1869-'70, Chapter 100.)

"An Act to enable the Northwestern North Carolina Railroad Company to complete the first division of its road."

"The General Assembly of North Carolina do enact:

"SECTION 1. For the purpose of supplying funds to enable the Northwestern North Carolina Railroad Company to complete and equip its road to such extent as may be necessary, the said company shall have the power to borrow money by the issue and sale of bonds, or other evidences of debt, authenticated in such manner as the president and directors of said company may deem best, in sums not less than five hundred dollars, said bonds bearing a rate of interest not exceeding eight per cent per annum, payable semi-annually, principal and interest payable at such time and place as said president and directors may

select, the bonds so issued not to exceed three hundred thousand dollars.

"SEC. 2. To secure the payment of such bonds and other evidences of debt issued as aforesaid, and the interest thereon, the said Northwestern North Carolina Railroad Company may execute and deliver mortgage deeds or deeds in trust, signed by the president and countersigned by the secretary of the said company, conveying its franchise and property of whatever kind now or hereafter to be held, including its road-bed, superstructure, choses in action and real and personal estate, to the holder of said bonds, or to such parties as such president and directors may select, in trust for them, and the deeds so executed and registered in the county of Forsyth, which registration shall be sufficient for all purposes, shall have priority over any lien or other claim made by the State on the subject matter so conveyed, whether now existing or hereafter to exist under laws heretofore enacted, it being the intent and meaning of this act that the State shall have the rights and be in the position of a second mortgagee, subordinated to the lien created by the trust or mortgage deed aforesaid.

"SEC. 3. All acts of the General Assembly authorizing the appropriation of bonds of this State in aid of the first division of said railroad company are hereby repealed, the validity of preceding laws not to be by such repeal affected, but such laws to be in full force.

"SEC. 4. This act shall be in force from and after its ratification.

"Ratified the 22d day of March, A. D. 1870."

6.

(Acts 1870-'71, Chapter 178.)

"An Act to enable the Northwestern North Carolina Railroad Company to complete their road to Salem."

"WHEREAS, The State, by her appropriations and other pledges, did induce and encourage the Northwestern North Carolina Railroad Company, chartered by ordinance of the Convention in the year one thousand eight hundred and sixty-eight, to

lay out their line of railroad, and by private subscriptions to grade and construct their road-bed, with bridges, cross-ties, and some depot buildings, as far as the towns of Winston and Salem, in Forsyth County, and by the withdrawal of such aid by the State, the said company are without present means of completing said road; and whereas, it is greatly to the interests of the State, and especially the fertile region thereof through which the projected line of said road will pass, that the same shall be at once completed to Salem, and as soon thereafter as practicable to the Tennessee line:

"The General Assembly of North Carolina do enact:

"SECTION 1. That the said Northwestern North Carolina Railroad Company shall have the right, and their charter is hereby so amended as to enable them at any time within two (2) years after the ratification of this act, to unite such consolidation with any other railroad company whose line, now built or to be built, under any existing charter, connects with, or may under such existing charter connect with, the line of the said Northwestern North Carolina Railroad Company, and who will agree and contract with the said Northwestern North Carolina Railroad Company to build and complete the same from Greensboro to Salem, in Forsyth County, without delay.

"SEC. 2. That for the purpose of carrying into effect the provisions of the foregoing section, it shall be lawful for any of the said railroad companies which connect, or may connect as aforesaid, with the said Northwestern North Carolina Railroad Company, and the respective charters of such roads are hereby so amended as to enable them, at a special meeting of the stockholders called for such purpose, or at any regular meeting after the ratification of this act, to consider and agree to propositions of the said Northwestern North Carolina Railroad Company, to unite and consolidate with such company, as provided for in section one of this act, and to contract with the said Northwestern North Carolina Railroad Company for such completion of their road from Greensboro to Salem, as aforesaid, such contract, if accepted by both contracting parties, to be signed by the presidents of such contracting companies in duplicates, one to be preserved by each of said companies.

"SEC. 3. That upon the execution of such contract and the completion of the said road from Greensboro to Salem, according to the terms of the contract, all the powers, rights, privileges, immunities and franchises of the said Northwestern North Carolina Railroad Company shall be transferred to, conferred upon and vest in the said connecting railroad company contracting as aforesaid with the said Northwestern North Carolina Railroad Company: *Provided, however,* that the holders of certificates of stock in the said Northwestern North Carolina Railroad Company, who have fully paid up their subscriptions thereto, shall be equal shareholders in the consolidated company.

"SEC. 4. That all laws, charters and clauses thereof inconsistent with this act are hereby repealed.

"SEC 5. This act shall take effect from its ratification.

"Ratified the 31st day of March, A. D. 1871."

7.

(Acts 1871-'72, Chapter 25.)

"An Act to amend the charter of the North (Western) Carolina Railroad Company, and for other purposes.

"WHEREAS, The Northwestern North Carolina Railroad Company executed and delivered two mortgages, one dated the sixteenth day of August, *Anno Domini* one thousand eight hundred and seventy, and the other dated the twenty-sixth day of June, one thousand eight hundred and sixty-nine, conveying its entire road, property and franchises, in the manner, upon the conditions, and for the purposes provided for by an ordinance of the Convention of the State of North Carolina, ratified the ninth day of March, one thousand eight hundred and sixty-eight, and by an act of the General Assembly of North Carolina, ratified the third of February, one thousand eight hundred and sixty-nine; and whereas, all the bonds loaned to said company by the State, under authority of said act of the General Assembly, have been returned to the Treasurer of the State, and all the bonds authorized to be loaned to said company by the State by said ordinance of the Convention yet remain in the Treasury of the State, although the company is legally entitled to them; and

whereas, it is necessary that said company should have power to raise money for its purposes; now, therefore,

"The General Assembly of North Carolina do enact:

"That whenever the president of the said Northwestern North Carolina Railroad Company shall certify to the Treasurer of the State of North Carolina that this act has been accepted as an amendment of the charter of said company, said Treasurer shall forthwith cancel both of the mortgages aforesaid, and deliver the same so cancelled to the president of said Northwestern North Carolina Railroad Company, and that said Treasurer do also cancel the bonds or other evidences of debt, signed, sealed and ready for delivery under any part of any ordinance of the Convention or act of the General Assembly of North Carolina making appropriations or providing for loans to the said railroad company, and file the same so cancelled among the archives of his office.

"SEC. 2. That the said company be, and it is hereby, authorized to issue, sell or otherwise dispose of for its purposes, its bonds or other evidences of debt, to an amount not exceeding twenty thousand dollars per mile of its road, bearing interest at a rate not exceeding eight per cent per annum, and to secure the same by one or more mortgages or deeds of trust upon its road, property, real and personal franchises, rights and privileges now held, or which may hereafter be acquired, in such manner and form as the board of directors of said company may determine. And the registration of any mortgage or deed, executed in accordance with this act, in the county of Forsyth, in the State of North Carolina, shall have the same effect as if such mortgage or deed were registered in every county in said State in which any of the property conveyed may be, any law to the contrary notwithstanding.

"SEC. 3. The said Northwestern North Carolina Railroad Company is also hereby empowered to contract with any corporation or person to complete the whole or any part of its railroad, and to issue to such party shares of its capital stock, and to use for the purpose the bonds or evidences of debt of said company hereinbefore authorized to be issued, upon such terms and con-

ditions as may be agreed upon by the contracting parties: *Provided, however*, that the said company shall, in no event, issue shares exceeding the amount of its capital stock as fixed by law.

"SEC. 4. All parts of ordinances of the convention and of acts of the General Assembly of North Carolina making appropriations in behalf of, or providing for subscriptions or loans to said company by the State of North Carolina, and all parts of such ordinances as are inconsistent with this act are hereby repealed.

"SEC. 5. This act shall be in force from and after its ratification.

"Ratified the 3d day of January, A. D. 1872.

"STATE OF NORTH CAROLINA,
"OFFICE OF SECRETARY OF STATE,

"RALEIGH, February 28, 1872.

"I hereby certify that the dates mentioned in the preamble of the above act were inserted in accordance with "An act to repeal an act passed at the present session and ratified on the fifteenth day of January, one thousand eight hundred and seventy-two, and entitled an act supplementary of an act to amend the charter of the Northwestern North Carolina Railroad Company, and for other purposes, and to fill certain blanks," ratified January 23, A. D. 1872. "H. J. MENNINGER,
"Secretary of State."

8.

(Chapter 47, Laws 1871-'72.)

"An Act supplementary to an act entitled 'An act to amend the charter of the Northwestern North Carolina Railroad Company, and for other purposes.'

"The General Assembly of North Carolina do enact:

"SECTION 1. That the aforesaid 'act to amend the charter of Northwestern North Carolina Railroad Company, and for other purposes,' passed at the present session, be amended as follows, to-wit, by striking out from the preamble thereof the first para-

graph thereof, beginning with the word 'whereas' and ending the words 'February, eighteen hundred and sixty-nine,' and insert the following: 'Whereas, the Northwestern North Carolina Railroad Company executed and delivered to the State a mortgage, dated the twenty-sixth day of June, eighteen hundred and sixty-nine, conveying its entire road, property and franchises in the same, upon the conditions and for the purposes provided for by an act of the General Assembly of North Carolina, ratified the third day of February, eighteen hundred and sixty-nine.'

"SEC. 2. That section one of said act be also amended by striking out, in line seven, the words 'both of the mortgages aforesaid,' and inserting in the room and stead thereof the words 'the said mortgage.'

"SEC. 3. That this act be in force from its ratification.

"Ratified the 15th day of January, A. D. 1872."

3—EXHIBIT "E."

"An Act to amend the charter of the Northwestern North Carolina Railroad for the construction of a second division from the town of Winston and Salem, in Forsyth County, up the Yadkin Valley, by Wilkesboro, to Patterson's factory, Caldwell County.

"The General Assembly of North Carolina do enact:

"SECTION 1. That section thirteen of chapter seventeen of the ordinance of the Convention of one thousand eight hundred and sixty-eight, ratified the ninth day of March, one thousand eight hundred and sixty-eight, be amended by adding the words 'and one of which shall be constructed from the town of Winston and Salem, up the valley of the Yadkin, by way of Jonesville and Wilkesboro, in the county of Wilkes, to Patterson's factory, in the county of Caldwell, which branch shall be known as second division.'

"SEC. 2. That said ordinance be amended by inserting a new section between sections thirteen and fourteen, to read as follows: 'That the Penitentiary Board is authorized and directed to

farm out to (the) president and directors of said company, for the purpose of constructing the second division of said road, two hundred able-bodied convicts to work on the construction of said railroad, but the said convicts shall be at all times under the supervision and control, as to their government and discipline, of a supervisor, who shall be appointed by the Governor upon the recommendation of said railroad company: *Provided*, that there shall be an estimate made of the net value of the labor done by said convicts on the road of said company, to be fixed on a just and equitable basis by the president of said company and a person appointed by the Governor on the part of the State, and the net value of labor shall be a first lien on all property and franchises of said second division of said railroad: *Provided further*, that the State shall not be at any expense for the feeding, clothing and other care of said convicts.'

"Sec. 3. Nothing in this act shall be construed to interfere with the convicts assigned to any road in which the State has an interest.

"Sec. 4. That any township or city, town, county or
18 other municipal corporation of this State, shall have power and authority to subscribe for and take any number of shares of capital stock of said company that a majority of the voters of such township or city, town, county or other municipal corporation may elect to take therein. That upon (the) request of twenty residents and taxpayers of any such township or city, town, county or other municipal corporation of this State, the municipal corporation (and in case of township, the Justices of the Peace of such township), shall determine the number of shares in the said company proposed to be taken by such township or city, town, county or other municipal corporation, and shall appoint a day on which an election shall be held in such township or city, town, county or other municipal corporation, in the manner prescribed by law for holding elections, at which election the legally qualified voters of such township or city, town, county or other municipal corporation, shall be entitled to vote for or against such subscription, the legally qualified voters favoring such subscription to vote ballots written or printed 'Railroad,' those opposing such subscription to vote 'No Railroad.' The election herein provided for shall be

held at the usual voting places for such townships or cities, towns, counties or other municipal corporations (and, in case of townships, by Justices of the Peace of such townships), in the same manner that persons are appointed for holding other elections. And the returns thereof shall be made and the result thereof announced as in other elections prescribed by law: *Provided*, that in case of townships, the Justices of the Peace of such township, for carrying out the purpose of this act, shall be vested with all the powers vested in the boards of commissioners and Justices of the Peace of counties as to the manner of appointing the persons to hold elections, and so forth, by law for the purpose of holding other elections, and townships shall have corporate powers for the purpose of this act. If the result of any such election shall show that a majority of the qualified voters of any township or city, town, county or other municipal corporation favor the taking of the amount of stock so voted for in such election, then the authorities who by this act are empowered to determine what amount of stock shall be taken, shall subscribe the amount of stock so voted for in said company, and shall have power to levy and collect taxes for that special purpose to pay for the said stock in installments as the same may become due, or, in case it shall not be deemed best to collect taxes to pay by taxation such subscription for stock, then such township or city, town, county or other municipal corporation shall have power to issue bonds for the purpose of raising
19 money to pay for such subscription, and shall provide for the payment of interest upon said bonds, and also for the payment of said bonds when they become due: *Provided, however*, that any township, county or other corporate authorities who shall issue any bonds or issue any obligations in behalf of this road shall be required to commence as soon as said obligations are assumed to provide a sinking fund that shall be sufficient to liquidate said bonds or obligations at maturity: *Provided further*, that nothing in this charter shall be construed to exempt said railroad from taxation.

"Sec. 5. That this act shall be in force from and after its ratification.

"Read three times in the General Assembly and ratified the 20th day of February, A. D. 1879."

10.—EXHIBIT "G."

"An Act to authorize the Northwestern North Carolina Railroad Company to extend its road and to build branches thereof.

"The General Assembly of North Carolina do enact:

"SECTION 1. That it shall be lawful for the Northwestern North Carolina Railroad Company to extend and construct its line of road, or a branch thereof, to commence at or near Winston, in the county of Forsyth, through the counties of Forsyth, Davidson, Yadkin, Davie, Rowan and Iredell, or any or either of them, to Statesville, or some other point on the Western North Carolina Railroad, and may build and operate additional branches thereto, or from its present main line to any important mines or manufactories in any of said counties, or counties adjacent to them: *Provided,* that nothing contained in this act shall operate to be construed so as to prevent or interfere with the construction of the North Carolina extension of the Virginia Midland Railroad from Danville, Virginia, via Winston, Forsyth County, and Mocksville, Davie County, to some point on the Atlantic, Tennessee and Ohio Railroad, in Iredell County; but said company is hereby authorized to build said road under the organization and consolidation heretofore made by the stockholders and directors of the consolidated line composing the North Carolina extension.

"SEC. 2. That to provide the means in whole or in part for this purpose, the said company may receive subscriptions in money, labor, property, or otherwise, as the said company may agree, and may mortgage or otherwise pledge its property and franchises, and the work constructed, or to be constructed, with the franchises and rights connected therewith.

"SEC. 3. That any corporation, county, city, town or township interested therein, may subscribe to stock for said purpose,
or otherwise contribute to such work in such manner and in
21 such amount as shall be determined by the proper authori-
ties of such corporation, county, city, town, or township, and agreed on with the said Northwestern North Carolina Railroad Company.

"SEC. 4. This act shall be in force from and after its ratification.

"In the General Assembly read three times, and ratified this the 2d day of March, A. D. 1881.

11.

"1. Statutes bearing on the authority to issue bonds.

"Chapter 136 of the Laws of N. C., 1852.

"Chapter 17 of Ordinances of Constitutional Convention of 1868.

"Chapter 33 of the Laws of 1868 and 1869.

"Chapter 90 of the Laws of 1868 and 1869.

"Chapter 100 of the Laws of 1869 and 1870.

"Chapter 178 of the Laws of 1870 and 1871.

"Chapter 25 of the Laws of 1871 and 1872.

"Chapter 47 of the Laws of 1871 and 1872.

"Chapter 140 of the Laws of 1872 and 1873.

"Code of North Carolina, section 1967, subsection 10.

UNDER THE ESTABLISHED RULE FEDERAL COURTS MUST LEAN TOWARD AN AGREEMENT OF VIEWS OF THE STATE COURT, BECAUSE ON THE FIRST HEARING OF THE STANLY COUNTY BOND CASE, INVOLVING ONLY THE CONSTRUCTION OF THE CODE, SECTIONS 1996 TO 2000, THE CIRCUIT COURT OF APPEALS, IN COMMISSIONERS v. COLER, 96 FED. REP. 284, AGREED WITH THE STATE COURT IN HOLDING THAT SAID SECTIONS WERE INSUFFICIENT TO EMPOWER A COUNTY TO ISSUE BONDS, ALL OF THE JUDGES CONCURRING, WHILE ONLY A MAJORITY CONSENTED ON REHEARING TO OVERRULE THAT OPINION.

It has been held in this case, that Federal Courts must follow the construction given to section 14, Article 2, of the Constitution, by the State Court and they ought to incline to follow the construction placed upon the sections of The Code, in *Commissioners v. Snuggs,* and since affirmed in *Commissioners v. Call,*

123 N. C., 308, and *Commissioners v. Payne*, 123 N. C., 432, and other cases.

Wilkes County v. Coler, 180 U. S., 506.

The established rule of the Federal Courts is to resolve all reasonable doubts in favor of the construction placed by the State tribunals upon their own statutes.

"The construction by the courts of a State of its constitution and statutes is, as a general rule, binding on the Federal Courts. We may think that the Supreme Court of a State has misconstrued its constitution or its statutes, but we are not at liberty, therefore, to set aside its judgments. That Court is the final arbiter as to such questions. In *Claiborne County v. Brooks*, 111 U. S., 400, 410 (28—470, 474), it was said: 'It is undoubtedly a question of local policy with each State, what shall be the extent and *character of the powers which its various political and municipal orgnizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States;* for it is a question that relates to the internal constitution of the body politic of the State.' (See also *Burgess v. Seligman*, 107 U. S., 20, 33; *Butcher v. Cheshire R. Co.*, 125 U. S., 555; *Detroit v. Osborne*, 133 U. S., 492; *South Branch Lumber Co. v. Ott*, 142 U. S., 622; *Kaukauna Water Power Co. v. Green Bay and M. Canal Co.*, 142 U. S., 254; *McElvaine v. Brush*, 142 U. S., 155; *Stutsman County v. Wallace*, 142 U. S., 293, quoting *Norton v. Shelby County*, 118 U. S., 425 and *Gromley v. Clark*, 134 U. S., 338; *Morley v. Lake Shore M. S. R. Co.*, 146 U. S., 162; *Bauserman v. Blount*, 147 U. S., 647; *May v. Teney*, 148 U. S., 60; *Baltimore and O. R. Co. v. Baugh*, 149 U. S., 368, 373; *Lewis v. Monson*, 151 U. S., 545; *Balkam v. Woodstock Iron Co.*, 154 U. S., 177, quoting *Leffingwell v. Warren*, 67 U. S., 2 Black., 599, 603.)"

Where it is found that no construction had been given to a statute by the State court when the transaction was entered into, the Federal courts *"will lean toward an agreement of views with*

the State courts, if the question seems to them balanced with doubt."

Burgess v. Seligman, 107 U. S., 17, 38.

It is true that all courts incline to hold commercial paper, in the hands of innocent purchasers for value, valid, but nowhere, except in the concurring opinion of Judge Boyd and in the brief of Mr. Price, have we found an intimation that in order to uphold municipal bonds, "if it can do so under any circumstances" or "if it is possible to do so," a Federal court must lean against instead of in favor of a ruling by a State tribunal that the creation of a debt by a municipality was *ultra vires.* Justice Gray, in *Louisville R. Co. v. Louisville Trust Co.*, 174 U. S., 573, 574, said, quoting 10 Wall., 604:

"Where a party deals with a corporation in good faith, *the transaction is not ultra vires and he is unaware of any defect in authority*, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists."

THE CONTENTION OF THE PETITIONERS IS THAT THE AUTHORITY TO SUBSCRIBE WAS LIMITED TO A CERTAIN CLASS OF COUNTIES. IF A COUNTY WAS NOT A DONEE OF SUCH POWER BY REASON OF BELONGING TO SUCH CLASS, IT COULD NOT CONFER SUCH AUTHORITY ON ITSELF BY RECITATIONS EITHER IN BONDS OR IN THE MINUTES OF ITS GOVERNING OFFICIALS.

If the Legislature had not intended to restrict the power of "the boards of commissioners of the several counties" to aid railroads to those in which the citizens of the county may have an interest, it would have *omitted the qualifying clause "when necessary to aid in the completion of a road in which the citizens of the county may have an interest."* and have allowed any county to subscribe stock "to any railroad company or companies." The qualifying words are surplusage, according to the construction of the circuit court of appeals.

If the clause descriptive of the company to which the subscriptions might be made is not meaningless and mere surplusage, it confers power only on a certain class of counties. *If a county not authorized attempts to subscribe, it is acting ultra vires.* Whether there is anything in the transaction to excite suspicion or not, a purchaser is bound to look to the power of a municipality to issue bonds, and must lose when he buys bonds issued without legislative authority.

The language of Code, section 1996, relied upon as authority for the issue of the bonds, is as folows:

"The boards of commissioners of the several counties shall have power to subscribe stock to any railroad company or companies when necessary to aid in the completion of any railroad in which the citizens may have an interest."

What is meant by the words "any railroad in which the citizens of a county may have an interest?" The petitioners submit that the courts of America and the British Empire have uniformly construed the word "interest" in such connections to mean "pecuniary interest" in the thing referred to—here, in the railroad.

DEFINITION OF THE WORDS "INTEREST" OR "INTERESTED."

In construing a statute prohibiting any member of a council from having a direct or indirect interest in a contract of the corporation, the Supreme Court of Michigan, in *Swedly v. Kirby*, 79 N. W. R., 188, said:

"This indicates that a pecuniary interest was intended. Anderson defines interest as such relation to the matter in issue as creates a liability to pecuniary loss or gain from the event of a suit."

Taylor v. Highway Commissioners, 88 Ill., 527.
Northampton v. Smith, 11 Met. (Mass.), 395.

In a case where the question was whether a salaried employe

of a firm of contractors was interested in the contracts of the firm, the Pennsylvania court said:

"The word interested does not mean anything but pecuniary interest, and of this there is no evidence."

Dunlap v. Philadelphia, 13 W. N. C. (Pa.), 98.

The Supreme Court of Illinois, in passing upon the questions whether the State had an interest, within the meaning of the statute in a *quo warranto* proceeding to try title to an office, said: "The interest which a State must have in such a cause is a *substantial interest as a pecuniary interest.*"

McGrath v. People, 100 Ill., 461.

In *State v. R. Co.*, 36 N. J. L., 164, the court, drawing the distinction between estates and interest in a statute providing for condemnation of right-of-way, said:

"Under the more comprehensive term, 'persons interested,' are included not only persons in whom is vested the legal title which the company proposes to acquire, * * * but also other individuals having some independent right or interest therein, * * * such as an easement of a right-of-way, inchoate rights of dower or courtesy, or incumbrances, such as by judgments or mortgages, which are charges on the legal estate. The obect is * * * that their interest may be extinguished by payment."

The Supreme Court of California, construing a statute allowing a party "beneficially interested" a writ of review of an order of the board of supervisors, granting a right to use a highway for the purpose of constructing a railroad, held that an affidavit alleging that "affiant, in common with others living along the highway, would be damaged," was insufficient, and said:

"It does not appear by the petition in this case that the *petitioner has any other or greater right in the highway mentioned therein than any other citizen of the State.* * * * In an

application made by a private party, *his interest must be of a nature distinguishable from that of the mass of the community.*"

Linden v. Alameda County, 45 Cal., 7.
Ashe v. Colusa County, 71 Cal., 236.

If a person living on a highway has "*no other or greater interest therein than any other citizen of the State,*" *then a person living on or in the vicinity of an improved highway—a railroad—has no other or greater interest in the railroad* than any other citizen of the State, and the citizens of Wilkes County, whether they live along or away from the line of railway, "*have no other or further interest therein than any other citizen of the State.*"

ADDITIONAL AUTHORITIES CONSTRUING "INTEREST" AS MEANING A PECUNIARY, VALUABLE, OR BENEFICIAL INTEREST, NOT MERELY A PATRIOTIC OR SENTIMENTAL INTEREST WHICH A CITIZEN OF A STATE OR COUNTY FEELS IN A PUBLIC IMPROVEMENT.

As shareholders, by reason of a subscription already made, the citizens of the county would have an interest in any contract from which, as shareholders, they might derive profit, as by making an incomplete road more valuable by extension.

Todd v. Robinson, Q. B. D., 739.
Hunnings v. Williamson, 112 Q. B. D., 536.

"Beneficial interest" was construed to mean present, vested, or valuable interest by the Supreme Court of Massachusetts.

Dexter v. Cotting, 149 Mass., 92.

Interest in an estate or action, where requisite to give a person standing in court as a party to an action, is universally construed to be a beneficial, valuable, vested, or pecuniary interest.

Bachman v. Packard, Q. Fed. Cas., No. 709.
Northampton v. Smith, 11 Met. (Mass.), 395.
Goodall v. Tuttle, 10 Fed. Cas., No. 5533.

Whitney v. Brittain, 16 N. Y. App. Div., 457.
Hevin v. Valcano, etc., Co., 13 Ca., 62.
Bugher v. Gott, 3 N. Y. Supp., 518.
Whitney v. Barley Q. B. D., 154.
Burgess v. Clark, 14 Q. B. D., 735.
Gasquet v. Johnson, 1 La., 431.

The interest which disqualifies a Judge from sitting is held to be "a property interest" in the action and its results, not "the interest which he may have in common with other citizens in a public matter."

Sauls v. Freeman, 24 Fla., 209.
Chicago, etc., R. Co. v. Kellogg, *supra*.

The foregoing list of authorities might be enlarged by adding scores of cases in which the word interest is interpreted in the same way, but it is not deemed necessary to cite any but the following:

Taylor v. Norment, 88 Ill., 327.
Wilson v. Railroad, 37 Ala., 358, 360.
In re. Estate of White, 37 Cal., 100.
Shelton v. Derby, 27 Conn., 415, 421, 425.
Smith v. Phillips, 62 Ala., 578.

"Interest" is defined in dictionaries, where it relates to property such as railroads, generally as a legal concern of a person in a thing, or in the conduct of another person, whether it consist in the right of enjoyment of or benefit from property or right to claim an advantage, or be subjected to a liability on account of the conduct or management of property.

In other words, an interest is either a legal right in a thing, as property, or such a relation to it as to enable one to participate in the profits of its conduct or management, or share in the loss arising from its management.

One of the definitions given by the Standard Dictionary of "*interested*" is "*being a part owner; as one interested in railroad shares.*"

It is contended for the petitioners that the citizens of a county, collectively, could only be interested, in the ordinary and obvious meaning of the word as applied to railroads, where the corporation, which embodied all rights of the citizens as a body, has some interest in the shares of its stock. This definition is in harmony with the contention of the petitioners that the last clause of section 1996 is surplusage, unless it restricts the power to subscribe to roads in which the county may already own shares of stock.

The lexicons and law books uniformly define an interest in any kind of property in the same way. If the word has no technical meaning, then it must be interpreted according to its ordinary meaning.

Adams v. Turrentine, 30 N. C., 147.
Blue v. McDuffie, 44 N. C., 13.
Randall v. Railroad, 107 N. C., 748, 750.

Whatever rule of construction may be followed, the interpretation must be the same, and, seeing this, on the first hearing, Judge Goff incorporated into the opinion the entire discussion of this point by the Supreme Court of North Carolina in *Commissioners v. Snuggs,* expressing briefly the approval of the Court. (See 96 Fed. Rep., 284.)

On the other hand, in the opinion delivered on February 4, 1902, in *Commissioners of Stanly v. Coler & Company,* the Court assumes that the Legislature did not mean "interest" in the sense of "pecuniary interest," because the qualifying word was inserted in the Constitution in reference to the State, but was omitted from the statute. The Court said the words "in which a citizen of a county may have an interest" in a railroad would seem to be the appropriate words to express the general interest which the whole body of the people of a county have in a railroad which they believe will benefit them, as distinguished from direct pecuniary interest of the county as a corporation. This construction of the word by the Court of Appeals is in direct conflict with the authorities cited, and is not supported by a single reference to law book or lexicon. The construction of the

State Court is set aside without a discussion, because that court, following the overwhelming weight of authority, held that the word "pecuniary" could only intensify and emphasize the word "interest," and that the word "interest," in such a connection, was intended to denote pecuniary interest, and was, except for the purpose of emphasis, surplusage. *But half of section 1996 is declared surplusage by the Court of Appeals in order to lean against the construction of the State Court.*

This opinion is remarkable in that it disposes of the ruling of a State Court with so little ceremony, and in that, though overruling the construction given by the State Court to its own statute, it substituted its own interpretation without citing an authority to sustain its views. Indeed, no reason whatever is given for rejecting the definition of the Court, though it would seem that the concensus of opinion in all Courts has been that, when applied to property, an interest means a pecuniary interest; and no regret is expressed for disregardig the State's construction.

Was it not reasonable and proper that the Supreme Court of North Carolina should adopt the definition given both by law books and dictionaries, and should have added that such an interpretation of a statute enacted by the reconstruction Legislature was in harmony with the policy of the reconstruction constitution? Of this, that Court, having knowledge of the peculiar conditions in the State and its policy, as indicated by a comparison of its various laws and their interpretations, was certainly more competent to judge. (See discussion of policy, *post.*)

Judge Boyd, in the concurring opinion in *Commissioners v. Coler, supra,* declares it to be both the right and duty of the Court of Appeals to "construe the language of sections 1996-2000 according to their natural and proper meaning;" but he fails to refer to law books or lexicons from which that Court gathered the "natural and proper meaning."

We challenge the respondents to produce authority of Courts or scholars for such a definition of interest as applied to a railroad.

The statute requires the subscription must be "necessary to aid in the completion of any railroad," etc.

The petitioners respectfully insist that the word "COMPANION" has also a most material bearing upon the question of legislative authority—that is, in indicating the *class of counties* to which the act refers.

Judge Goff, in delivering the unanimous opinion of the Circuit Court of Appeals, 96 Fed. R., *supra:*

"But did the sections above mentioned give additional and complete authority to order the elections, issue the bonds and levy the taxes to pay them, principal and interest? Section 1996 is in these words: 'The Boards of Commissioners of several counties shall have power to subscribe stock to any railroad company or companies when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest.' It will be necessary, in order that that section may be construed to give authority to the Commissioners to issue the bonds, that the language should include a railroad not begun to be built before the Constitution was adopted; that the word 'completion' should be construed 'building' or 'construction,' extending even to the building of a new road; for in this case before us, it appears that the road had not begun to be built. We can not see why the word 'completion' should be thought to have been used by the legislators in any other sense than the one most usual and natural. Ordinarily, the words 'to complete' are understood to mean 'to finish,' 'to fulfill,' and the word 'completion' to mean the 'finishing' or 'accomplishing in full' of something which has already been commenced; as, for instance, it is most frequent to hear the word 'completion' used in connection with the finishing years and months of the education of the young. The object of the statute must have been to provide, by general act, means by which the counties, without special legislation for each county by separate bills, might be enabled to complete unfinished railroads in which the counties had a pecuniary interest. At the time of enactment of the statute of 1868-'69, and always since that time, any county of the State, duly observing the limitations of section 7 of Article VII of the Constitution, and under an act passed according to the require-

ments of section 14 Article II, of the Constitution, could, and can, subscribe to the capital stock of a railroad company, whether unfinished or to be begun. *The act of 1868-'69, however, considering the condition of the affairs then existing—that is, that there were counties which had a pecuniary interest in the railroads that had been begun, but unfinished—enabled such counties to make subscriptions of bonds to complete such unfinished roads at the earliest moment and with the least cost, by general law, passed according to section 14, Article II, of the Constitution."*

THE LEGISLATURE OF NORTH CAROLINA INTENDED TO EMPOWER ONLY THOSE COUNTIES WHICH HAD ALREADY INVESTED IN THE STOCK OF A RAILROAD COMPANY, BUT HAD NOT THEREBY EFFECTED THE COMPLETION OF THE LINE, TO MAKE AN ADDITIONAL SUBSCRIPTION TO THE STOCK.

Because, FIRST, any other construction would have allowed a subscription to be made by any county in the State, for the citizens of Wilkes County, by reason of vicinage, *had no other or greater interest " in the railroad than other citizen of the State."*

SECOND. According to all rules of construction, it must be assumed that the Legislature intended to describe a class of counties, and limit the power to them, since it is an established rule that the Courts must, if possible, give effect to all of the words of a statute, as the Supreme Court of North Carolina did; whereas, the Court of appeals found it necessary, in order to sustain the bonds, to construe the words of limitation as mere surplusage.

THIRD. It is an historical fact, alluded to in *Galloway v. Chatham Railroad Co.*, 63 N. C., 147, and *University v. Holden*, 63 N. C., that counties, as well as the State, had been lending their credit and subscribing to the stock of railroad companies, and that section 14, Article II, and section 7, Article VII, of the Constitution of 1868, had been inserted in that instrument to restrain counties from reckless expenditures of

this kind, just as sections 1, 4, article VI, had been framed as a check upon extravagant legislation by the State. (See 63 N. C., page 147.)

FOURTH. Sections 1996 to 2000 of The Code were first enacted by the reconstruction Legislature of 1868, which attempted to shape the statutory law so as to bring it into harmony with the Constitution, and it is in harmony with the general policy of the State to construe the restrictive clause of section 1996 as conferring the authority to subscribe on counties already interested pecuniarily in the railroad to which they propose to subscribe, just as the Legislature, in order to protect investments already made by the State, was empowered to subscribe to railroads in which the State had already become interested.

FIFTH. Section 3766 of The Code (enacted in 1868) provides that where statutes are re-enacted "the portions not altered are to be considered as having been the law since their enactment; and at the time of their enactment."

Neither The Code, sections 1996 to 2000, nor the charter are sufficiently specific to comply with Article V, sections 6 and 7, of the Constitution.

In *Commissioners of Buncombe County v. Payne* (123 N. C., 432, 488, decided December 8, 1898, a month after the opinion was filed in *Commissioners v. Call*, on November 9, 1898, and during the same term), the Court said, at page 448:

"*A general act, authorizing any and all counties to issue bonds, would be invalid, especially when (as in the case here) it is necessary* to exceed the constitutional limitation *to pay interest or principal. Tate v. Commissioners*, 122 N. C., 812 (at page 815); *Herring v. Dixon, id.*, 420 (at page 124)."

In *Commissioners of Wilkes v. Call*, 123 N. C., 308 (at page 324), Justice Douglass said, in reference to the necessity for specific statutes:

"If the word 'uncompleted' can refer to any road not yet begun, and the word 'interest' apply to a mere friendly feeling or supposed advantage to be derived from the general building up of a country, then the several counties may go on *forever*

subscribing unlimited amounts to any railroad in esse or in futuro that may be located within the range of their knowledge. Such a construction would simply nullify the Constitution by making its explicit restrictions vain and worthless. It can not be adopted by us, but, if we were forced to adopt it, we would be equally forced to declare those sections null and void. If they mean that, they have no place upon the statute books. While the Legislature may, in individual cases, grant to specific counties the necessary authority, in accordance with the provisions of the Constitution and subject to its restrictions, *it can not, by a sweeping act of unlimited application, utterly destroy its operation.* If the Legislature or the railroad company or the county had placed any such construction on those sections, additional legislation would have been deemed useless, and the recitals in the bonds would have been different."

In short, the declaration of the State Court is that the sections referred to, if susceptible of the construction placed upon them by the Circuit Court of Appeals, were in violation of the Constitution (referring, of course, to Article V, sections 6 and 7).

Article V, sections 6 and 7, are as follows:

"SEC. 6. *Taxes levied by County Commissioners.*

"The taxes levied by the Commissioners of the several counties for county purposes shall be levied in like manner with the State taxes, and shall never exceed the double of the State tax, *except for a special purpose, and with the special approval of the General Assembly.*

"SEC. 7. *Acts levying taxes shall state object, etc.*

"Every act of the General Assembly levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other purpose."

There is no finding as a fact in *Commissioners v. Payne, supra,* that the levy of a tax sufficient to meet the interest "or principal" at maturity would exceed the constitutional limit (of sixty-six and two-thirds cents on the hundred dollars in value of property taxed). But the Court takes judicial cognizance of public law and reports of the Auditor as to the assessed value of

property and the amount of taxes imposed. Upon this information, which is within the reach of every citizen who can read as well as of the Court, the Court declared that it would be necessary to exceed the limit in order to pay interest and principal at maturity of the Buncombe debt.

For like reason Justice Douglass said, in *Commissioners v. Call* (123 N. C., page 324), in condemning the construction of The Code now adopted by the Circuit Court of Appeals, which would allow all counties to subscribe "unlimited amounts to any railroad *in esse* or *in futuro*, that may be located within the range of *their knowledge*," said:

"Such a construction would simply nullify the Constitution *by making its explicit restrictions vain and worthless. It can not be adopted by us, but if we were forced to adopt it, we would be equally forced to declare those sections null and void. If they mean that, they have no place upon the statute books.*"

Judge Douglass was warranted in declaring, of his judicial knowledge, that it would be necessary for Wilkes County to exceed the constitutional limit. Were we to concede the soundness of the position taken by the Court of Appeals that it is not essential to levy a special tax " in the same bill," except when the tax will exceed the limit, then our position would be untenable under even that rule.

The construction placed by Justice Clark and Douglass, speaking for the Court in the Buncombe and Wilkes cases, upon the State Constitution, finds support in older adjudications of the State Court.

THE SETTLED LINE OF DECISIONS OF THE SUPREME COURT OF NORTH CAROLINA PRIOR TO OCTOBER 1, 1889, WHEN THE WILKES COUNTY BONDS WERE ISSUED, IS IN ACCORD WITH THE RULING IN COMMISSIONERS v. PAYNE, SUPRA, THAT A GENERAL ACT PURPORTING TO AUTHORIZE "ANY AND ALL COUNTIES TO ISSUE BONDS WOULD BE INVALID BECAUSE OF FAILURE TO PROVIDE FOR LEVYING A SPECIAL TAX."

In *Galloway v. Chatham Railroad Company*, 63 N. C. R., 151, 152 (decided at January Term, 1869), the Court held that there were two conditions upon which the State should be allowed to contract a new debt before the bonds of the State should be at par (under a fair interpretation of Article IV, section 5, of the Constitution):

1st. Unless it (the Legislature) shall, in the same bill, levy a special tax to pay the interest annually, and

2d. "Unless the subject be submitted to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon."

The Court held in that case that the meaning of the sections is that "the General Assembly shall have no power to create new debt or pecuniary obligation (except in two specified cases), unless *a special tax be levied in the same bill to pay the interest.*"

Thirty years later Justice Clark, delivering the opinion of the Court in *Commissioners v. Payne*, 123 N. C., at page 488, construed sections 6 and 7 of Article V of the Constitution of North Carolina, which is as follows:

"SECTION 7. Every act of the General Assembly levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other."

In connection with the prohibition in section 6 of Article V, that the tax levied by the counties "shall never exceed the double of the State tax, except for a special purpose and with the special approval of the General Assembly."

Judge Clark declared, for the Court, that neither the general provision of The Code, section 1999, nor the general provision of the charter of the Northwestern North Carolina Railroad Company, construed in connection with that of the Atlantic and North Carolina Railroad Company, was sufficienty specified to confer authority on Wilkes County to subscribe or issue the

bonds or levy the tax to meet the principal and interest of the bonds.

The provisions of The Code and of the charter referred to are as follows:

"SEC. 1996. The Boards of Commissioners of the several counties shall have power to subscribe stock to any railroad company or companies, when *necessary to aid in the completion of any railroad in which the citizens of the county may have an interest.*"

"SEC. 1999. In case the county shall subscribe the amount proposed in bonds, the Board of Commissioners shall have power to fix the rate of interest, not to exceed the rate of eight per cent, when the interest on said bonds shall be payable, and at what place, and shall also fix the time and place of paying the interest, and shall also determine the mode and manner of the same; and also to raise by taxation, from year to year, the amount necessary to meet the interest on said bonds."

"SEC. 2000. The taxes authorized by the three preceding sections to be raised for the payment of interest or principal, shall be collected by the sheriff in like manner as to other State taxes, and be paid into the hands of the County Treasurer, to be used by the Chairman of the Board of County Commissioners as directed by this chapter."

SECTION 12 OF THE CHARTER (PAGE 54 OF THE PRINTED RECORD), SECTIONS 33 AND 36 OF THE CHARTER OF THE ATLANTIC AND NORTH CAROLINA RAILROAD (PAGES 54 AND 55 OF THE PRINTED RECORD).

"SEC. 12. *Be it further ordained,* That the stockholders of said company may pay the stock subscribed by them either in money, labor, material for constructing said road, as the Board of Directors may determine, and that *all counties or towns subscribing stock to said company shall do so* in the same manner and under the same rules and regulations and restrictions as *are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company, for the government*

of such towns and counties as are now allowed to subscribe to the capital stock of said company."

Chapter 136 of the Laws of North Carolina, session 1852.

"SEC. 33. *Be it further enacted,* That it shall be lawful for any incorporated town or county, near or through which said railroad may pass, to subscribe for such an amount of stock in said company as they shall be authorized to do by the inhabitants of said town or the citizens of said county, in *manner and form as hereinafter provided."*

"SEC. 36. *Be it further enacted,* That for the purpose of paying the quotas on said stock as may be called for, or in the installments of such subscriptions as may fall due, the town authorities and the justices of the county shall have power to appoint an agent or agents to negotiate a loan or loans for and in the name of such town or county; and it shall be the duty of the authorities of such town and the justices of such county to levy such taxes annually on the persons, lands and other personal property within such town and county as may be sufficient to pay the amount of such loan or loans and the interest thereon, and as said town authorities and justices of such county shall deem necessary and proper, and to make such order or orders as shall be deemed necessary for the due collection and payment of the same; and the stock subscribed on behalf of such town and county shall stand pledged for the payment of the loan thus authorized to be contracted."

The Constitution of North Carolina provides as follows:

"ARTICLE II, SEC. 21. The style of the acts shall be: *The General Assembly of North Carolina do enact."*

The Supreme Court of North Carolina, in *State v. Patterson,* 98 N. C., 660, 661, 662, 665, 666 (decided September, 1887, two years before the bonds were issued), held that a statute in all other respects in the form prescribed, but without the prescribed enacting clause, was void.

The Court declared all of the requirements of the Constitution to be mandatory, using, at pages 661, 662, the following language:

"It (the Constitution) is not to be disregarded, ignored or suspended, or broken, in whole or in part, nor can any officer, or a co-ordinate branch of the government, supply, superadd or assume power and authority not conferred by it. In this latter respect it expressly provides that 'all powers not herein delegated remain with the people.'

"More particularly, for the present purpose, when the constitution prescribes and directs in terms, or by necessary implication, that *a particular power shall be exercised in a specified way, or a particular thing shall be done by a particular co-ordinate branch of government—as the Legislature—or by a particular officer or class of officers, and prescribes the way and manner of doing it, such direction cannot be disregarded; a due observance of it is essential, because the Constitution so provides, and its provisions are not in vain or of trifling moment. It is not of the nature of constitutions of government to provide non-essentials—useless, unimportant details—such as may be disregarded and dispensed with.* As we have said, they are organic—made upon solemn consideration by the sovereign authority, and contain general, essential provisions—details are avoided, unless deemed important—essential.

"The answer to these and like questions must be, that requirements of the Constitution shall prevail and be observed; and when it prescribes that a particular act or thing shall be done in a way and manner specified, such direction must be treated as a command, and an observance of it essential to the effectiveness of the act or thing to be done. Such act can not be complete—such a thing is not effectual—until done in a way and manner so prescribed" (Wilkes County Commissioners v. Coler, 180 U. S., 506, 521).

Justice Clarke in Commissioners v. Payne, 123 N. C., at page 488, construed the command contained in the latter half of sec-

tion 6, and section 7, of the Constitution according to the rule laid down in State v. Patterson, supra, two years before the bonds were issued in 1889, to-wit, in September Term, 1887. Justice Douglas followed the same rule when he declared that the provisions of the charter and the sections of The Code had no place on the statute book, if susceptible of the interpretation that they gave the same general authority to other counties as was given to Forsyth county.

By reference to Bank *v.* Commissioners, 116 N. C., 339 and Bank *v.* Commissioners, 119 N. C., 214, it becomes apparent that the Court of Appeals drew an inference from the two opinions that was unwarranted. The controversy was as to the validity of a subscription by the town of Oxford to a railroad company, which was chartered to build a railroad connecting the town of Oxford with the Coast Line, just as the ordinance of 1868 authorized the connection of Winston-Salem, in Forsyth county, intersecting by a line with the North Carolina road somewhere from Greensboro to Lexington. The town of Oxford was designated as the initial point of the proposed road, and the sufficiency of the authority was questioned in the first case (see 116 N. C., 363), because the Legislature had failed to provide in the charter itself the machinery for holding the election, and the Court decided that the general acts providing for holding such elections furnished the necessary authority as to the manner of holding them and counting votes; but it was not till the question was raised on the second appeal (119 N. C., 214) that the Supreme Court of North Carolina ever considered whether the authority to create the debt, *even with the approval of the voters of the town,* had been granted by the Legislature, and, then, apart from the question of estoppel, the discussion on the argument and in the opinion of the Court, was directed to the new evidence showing that the statute relied on as authority for issuing the bonds was not enacted in accordance with the requirements of Article II, section 14, of the Constitution.

It is a significant fact that the Act of 1868 (Code, secs. 1996 to 2000) was not referred to by Justice Bynum in the opinion in Belo v. Commissioners, nor by counsel in the argument of that

case, though the action was brought by Mr. McCorkle, former reporter and one of the ablest lawyers in the State, and though the case was decided eight years after the passage of the act of 1868-'9.

THE CASES OF HERRING v. DIXON, 122 N. C,. 420, AND TATE v. COMMISSIONERS, 122 N. C., 812, SUSTAINED JUDGE CLARK'S POSITION AS TO THE INSUFFICIENCY OF STATUTES PURPORTING TO CONFER GENERAL AUTHORITY ON COUNTIES TO CREATE DEBTS EXCEPT FOR NECESSARY EXPENSES.

It will be observed that the act construed in Herring *v.* Dixon, *supra,* conferred certain powers on three counties specifically named in the act, to-wit, Green, Wilson, and Wayne, and that the statute construed in *Tate v. Commissioners, supra,* named *Haywood county as the donee of certain power.*

WAS ANY POWER GRANTED TO WILKES COUNTY BY THE CHARTER, CONSTRUED WITH ALL AMENDMENTS FROM 1868 TO 1881, WHICH ARE HEREINBEFORE PRINTED AS A PART OF THIS BRIEF? DOES THE CHARTER AS AMENDED PLACE WILKES COUNTY IN THE SAME CATEGORY WITH FORSYTH COUNTY? THIS IS A QUESTION LEFT OPEN BY THE COURT IN WILKES COUNTY v. COLER, 180 U. S., 506.

In discussing the charter as a grant of power to issue these bonds, conceding the authority of Forsyth County to create such a debt, the Court began the discussion by laying down the proposition that Wilkes County was in a different category, in the following language (see *Commissioners v. Call,* 123 N. C., at page 313):

"First, we do not see that any authority whatever is given, or attempted to be given by these sections to Wilkes County to subscribe to the capital stock of this company."

"The cases are clearly distinguishable. Another important point of difference is that the Forsyth County bonds were voted and subscribed within a few months after the passage of the ordinance, before whatever power it may have given had expired by its own limitation. It is evident that the Legislature, as well as the railroad company itself, thought that the authority given in the ordinance was not sufficient, as in both cases additional legislation was sought and obtained. But with this especial difference: In the case at bar the amendatory act having been passed in violation of the mandatory provision of the Constitution, in legal contemplation, was never passed."

Construing its own laws, the Supreme Court of the State differentiated the case of Wilkes County and the power of Wilkes County from that Forsyth County. Under the established rule, the Federal Court must lean towards that construction and assume that it is correct, until it satisfactorily appears that its conclusions are not well founded.

Claiborne County v. Brooks, 111 U. S., 400, 410.
Burgess v. Seligmon, 107 U. S., 20, 23.

THE SAME CONSTRUCTION GIVEN TO THE CHARTER BOTH BY THE LEGISLATURE AND THE RAILROAD COMPANY ITSELF.

In doubtful cases of construction, the Supreme Court has been influenced, as have other appellate courts, by the fact that the Legislature of a State placed a given construction upon a statute of said State.

Garrett v. Mobely, 103 U. S., 580, 588.
Letter of Supreme Court to Governor of North Carolina, 114 N. C., at page 925.

"Where business relations have been heretofore adjusted or rights to offices have been recognized as settled by the legislative sanction so given to a particular construction of doubtful language, courts are even more averse to disturb or overrule a principle which has been accepted and acted upon by the public, because it had the approval of the lawmakers whose power to enact or modify statutes is limited only by the Constitution, and

whose interpretation of the organic law is entitled to such profound respect that it will be disturbed by the Courts only on the weightiest considerations." * * *

"We are confronted at the threshold of the investigation by the fact that the legal adviser of your Excellency has, at your request, submitted a well considered and strong argument upon the one side, while some others of the ablest and most learned members of the legal profession have favored us with powerful presentations of the opposing view. When the scales are so nearly evenly balanced, we deem it our duty to settle the preponderance by casting the legislative view, which is of peculiar weight in this case, into the scales where it belongs. Another consideration which influences us to act upon this view is the fact that, after applying all the rules devised to aid us in ascertaining the meaning of a constitutional provision, it must be admitted that the science of law is less exact in its application to construction to be placed upon words than to any other subject, since such is the imperfection of human language that lawmakers often fail to express their meaning in unequivocal terms, and the interpretation of doubtful expressions of their purpose almost always leads to conflict even amongst the most learned jurists."

Letter of Supreme Court, *supra*.

THE CONSTRUCTION OF COUNSEL FOR THE RAILROAD CAMPANY AND FOR THE COUNTY.

No attempt was made by a county to subscribe to the capital stock of the Northwestern North Carolina Railroad Company from August, 1868, until after the enactment of the amendments to the charter in 1879 and 1881 (see printed record, Exhibit "E," page 14, and Exhibit "G," page 17), in both of which *void acts* provisions were inserted purporting to authorize counties west of Forsyth to make subscriptions payable in bonds; *but between 1868 and 20th February, 1879, there was nothing that designated counties authorized to subscribe, except what appeared in the charter, sections 1 and 13 (printed record, Exhibit "A," pages 10 and 13)*, first, that the first division of the road should extend from some point on the North Carolina

Railroad to Winston-Salem, in Forsyth County, and should run by that place to the northwestern boundary of the State; and, second, that the company might construct branches, one of which should run from that place, by Mount Airy, in Surry County, to the line of the State of Virginia, and a provision of section 12 of the charter (printed record, page 13), *"that all counties or towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company for the government of such towns and counties as are now allowed to subscribe to the capital stock of said company."*

By reference to the printed record (pages 16, 38, 39, 44 and 46), it will appear that R. B. Glenn, counsel for the railroad company, and the advisers of the company, agreed upon the former bonds, reciting the Act of 1879 as authority. While this recital may not operate as an estoppel so as to prevent the holder of the bonds from relying on other legislation to authorize its issuance, the fact remains, that the opinion of the public, including the company to which the bonds were delivered, acting under the advice of counsel, should have its weight in determining whether the Supreme Court shall overrule the opinion of the Supreme Court of a State, following the legislative construction, as well as the construction of the public and parties interested, or whether the Supreme Court will overrule the decision of a Federal Appellate Court, not presumed by law to be so competent to construe the laws of the State. The appellants insist that this contemporaneous construction ought to incline the Court to lean to an agreement with the State Court.

Amoskeag Nat. Bank v. Ottawa, 100 U. S., 667.

THE REFERENCE TO THE CHARTER OF THE ATLANTIC AND NORTH CAROLINA RAILROAD COMPANY OPERATED TO CONFER POWER TO SUBSCRIBE ONLY ON THE COUNTIES SPECIFICALLY MENTIONED IN THE CHARTER, FORSYTH AND SURRY. WILKES WAS NOT MENTIONED AND WAS NOT THEREFORE MADE THE DONEE OF SUCH POWER.

The act incorporating the Atlantic and North Carolina Railroad Company (referred to in section 12 of the charter as the North Carolina and Atlantic Railroad Company) is chapter 136 of the Laws of North Carolina, enacted at the session of 1852, and the material portions of the charter, relating to subscripn by towns and counties, are printed in the record, pages 54 and 55. The provision of the charter "that all counties or towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company, for the government of such towns and counties as are now allowed to subscribe to the capital stock of said company," was held, in *Belo v. The Commissioners*, 76 N. C., 489, to be written into the charter by the reference, *as appellees contend*, so far as confer upon Forsyth County the authority to subscribe, without additional legislation.

Suppose that this contention is well founded, then the decision amounts only to a holding that it was "lawful" for Forsyth County, "through which" said railroad was *required to pass by sections 1 and 13 of the charter*, was clothed by this reference with power to subscribe. It is familiar learning that such powers can not be exercised by counties, except when given in direct terms or by necessary implication. An exhaustive list of authorities sustaining this elementary proposition will be found in Dillon on Corporations.

Commissioners v. Call, 123 N. C., at page 316.

UNDER A SETTLED LINE OF DECISIONS OF THE SUPREME COURT OF NORTH CAROLINA THE WORD "NEAR" IS HELD TO BE TOO INDEFINITE AS A DESCRIPTIVE TERM TO FIX AND DETERMINE LOCATION OF A BOUNDARY LINE. IT FOLLOWS INEVITABLY THAT THE WORD CAN NOT FIX THE LOCATION OF A COUNTY OR CLASS OF COUNTIES REFERRED TO IN A STATUTE.

The Supreme Court of North Carolina had, by a line of decisions running back for about a century before the bonds were

issued, held that the word "near" was too indefinite to fix and determine locations. Applying the principle that the Court had adjudged that a call for a stake, an indefinite point, in a known line, by a certain course, should be extended beyond the distance given so as to intersect with such line, while if the same call had been for a stake "*near*" such line, it should not be run or extended beyond the distance called for, because the word "*near*" designated no particular point.

Cansler v. Fife, 50 N. C. (5th Jones), 424, 427.
Mizell v. Simmons, 79 N. C., 182.

In *Cansler v. Fife* (50 N. C., at pages 427, 428), the Court said:

"In respect to the question as to Rickman's line, we also concur with his Honor. There was no evidence by which the jury could locate that line; supposing it to have been located, *the call for a Spanish oak, in or near* Rickman's line, *would not control course and distance,* because the Spanish oak could not be found, *and the word 'near' is not sufficiently certain. How near? One pole or fifty? Either would satisfy the term 'near.'*

"Harvey v. Goodman, 1 Dev. and Bat. Rep., 76."

In attempting to show that the line, *which is called a branch in the void Act of 1879,* is built as the second division, leaving out of view said void act, the Court (at page 116 of the record) said:

"The piece of railroad for which the bonds in suit were issued does run from Salem and Winston, in the general direction of the northwestern boundary line of the State, and, indeed, *it seems evident that such a railroad, to some point in the northwestern boundary line of the State, must pass near or through Wilkes County.*"

Construing the ordinance "*alone,*" the Court, in order to sustain the validity of the bonds, was driven to the necessity of holding as a matter of judicial knowledge that a line through an adjacent county to Wilkes would be within the meaning of

the ordinance (the charter) near to Wilkes County. "How near; one mile or fifty?" (50 N. C., page 428). Yet the law of North Carolina, before 1868, in October, 1889, was that a jury must be instructed that the word "near" was too indefinite to determine location. Yet the Court, in *Wilkes County Commissioners v. Coler,* 180, 506, 531, said:

"It is settled doctrine of this Court 'that the question arising in a suit in a Federal Court of the power of municipal corporations to make municipal securities,' is *to be determined* by the law, as judicially declared by the highest Court of the State, when the securities were issued, and that the rights and obligations of the parties accruing under such a state of the law, would not be affected by a different course of judicial decision subsequently rendered any more than by subsequent legislation."

"When the securities were issued" (in October, 1889) "the law of the State, as judicially declared by the highest Court of the State" for a century, was that the word "near" was too indefinite, as a descriptive term, to fix and determine location, and consequently that the Court could not say judicially, nor allow a jury to determine, that near a county means in an adjacent county or in a county between which and Wilkes there was only one county intervening.

THE PROVISIONS OF ALL THE AMENDMENTS TO THE CHARTER, WHICH PURPORT TO FIX THE LOCATION OF ANY LINE WEST, NORTHWEST OR SOUTHWEST OF WINSTON-SALEM, OR TO DETERMINE THE LOCATION OF ANY LINE EXCEPT THAT EXTENDING FROM THE NORTH CAROLINA RAILROAD TO WINSTON-SALEM, APPEAR IN THE STATUTES REFERRED TO IN EXHIBIT "H," PAGE 17, OF THE PRINTED RECORD, AND WHICH ARE SET FORTH IN FULL IN THIS BRIEF.

The first of these is the Act of August 11, 1868, which, as is admitted in the record, did not pass in the mode prescribed, and is void. It is manifest from reading the opinion in *Belo v.*

Commissioners, 76 N. C., at page 498, that, while the Court apparently held that the charter *conferred the authority on Forsyth County, which was mentioned specifically in the charter, not on any other county not so mentioned*, the Court held certain evidence offered, which is not mentioned in the opinion, incompetent and irrelevant, because "the ratifying Act of August, 1868, was a curative act and validated both the county subscriptions and the issue of the bonds, if any defect existed therein." Suppose evidence had been offered, as in this case, that the curative act was void, then the immaterial and irrelevant evidence offered to show the "defect," that might have been shown if that act had not been treated as valid, would have been admitted.

The Court said, in the Belo case, at page 498: "Declaring, as we do, that the ratifying act of August, 1868, was a curative act and validated both the county subscriptions and the issue of the bonds, if any defect existed therein (and it has been one purpose of this opinion to show that the bonds were valid in the hands of *bona fide* holders without aid of this healing act), *the proposed evidence of the defendants became immaterial and irrelevant.* As a matter of law the bonds were valid and the Court did not err in so declaring.

"The only issue submitted to the jury was: 'Is the plaintiff the *bona fide* owner and for value of the bonds and coupons mentioned in the pleadings, and was he such at the commencement of the action.' "

DID THE AMENDMENTS BETWEEN THE ENACTMENT OF THE CHARTER IN 1868 AND THE PASSAGE OF THE VOID ACT IN FEBRUARY, 1879, FOLLOWED BY THE VOID ACT OF 1881, FIX THE LOCATION OF ANY LINE OR BRANCH OF THE NORTHWESTERN RAILROAD AS RUNNING THROUGH WILKES COUNTY, THE WORD "NEAR" HAVING BEEN DECLARED BY THE SUPREME COURT OF NORTH CAROLINA, BEFORE THE BONDS WERE ISSUED, TOO INDEFINITE TO FIX THE LOCATION OF A LINE?

By reviewing these enactments, hereinbefore numbered 3, 4, 5, 6, 7, 8, it will appear that the only references to location in these last named amendments, the validity of which is not questioned, are as follows: First, the Act of the 21st of August, A. D. 1868, declares that the statute was enacted "for the purpose of *aiding in the construction of the Northwestern North Carolina Railroad from Salem, in Forsyth County, to Mount Airy, in Surry County.*" (See *ante*, 3, sec. 1.)

Second. That the Act of February 3, 1869, was enacted with two objects in view—

1st. "For the purpose of aiding in the construction of the Mount Airy division of the Northwestern North Carolina Railroad, *from Salem, in Forsyth County, to Mount Airy, in Surry County, and the first division of said road from Greensboro to Salem and Winston.*"

2d. "*For the purpose of aiding in the construction of the Yadkin Valley Division of said railroad, running from Salem and Winston, by way of Lewisville, thence by way of Yadkinville, in the county of Yadkin, or within one and one-half miles thereof, thence up the valley of the Yadkin to the foot of the Blue Ridge, in the county of Caldwell.*"

See *ante* No. 4, sections 1 and 2.

Third. That in the Act of the 31st of March, 1871, the line from the initial point on the North Carolina Railroad is mentioned as a line to be completed "*from Greensboro to Salem, in Forsyth County.*"

See *ante* 6, section 1.

THE VALIDITY OF THESE ACTS IS NOT QUESTIONED, WHILE THE ACT OF 1879 AND THE ACT OF 1881 HAVE BEEN DECLARED VOID, AND NO LAWS IN COMMISSIONERS v. CALL, 123 N. C., 308, AND IN WILKES COUNTY v. COLER, 180 U. S., 506. THE VOID ACT OF 1879 CAN NOT BE HELD VALID TO BRING WILKES COUNTY IN THE SAME CATEGORY

WITH FORSYTH INDIRECTLY BY MARKING OUT A LINE THROUGH WILKES COUNTY AND CHANGING THE LINE DESIGNATED IN PRIOR VALID AMENDMENTS.

Conceding that by writing the sections of the Atlantic charter into the charter of 1868, power was conferred upon the counties, through which the lines described in the charter necessarily passed, to subscribe to the capital stock of the company, it would be monstrous to supplement that proposition, by holding that the Act of 1879, by marking out a line through Wilkes County, though void in so far as it purported to confer power directly on Wilkes County, because not passed in the manner prescribed in the Constitution for the protection of the taxpayers, nevertheless effected the purpose of subjecting those taxpayers to liability, by purporting to declare in another section of the act, that a second division of the road should pass through Wilkes County. It seems to appellants that the mere statement of such a proposition carries its refutation with it. *To declare the amendment of 1879 so far valid as to vest Wilkes County with authority, which it would not otherwise have had, to create a debt, by marking out the route of the second division in section 1 of the act, though section 4 (printed record, pages 14 and 15), purporting to grant* directly the same power which has been held void, is to annul the Constitution and evade the decisions of the highest Courts—State and Federal.

The Circuit Court of Appeals was in error when it rested its opinion upon the ground that the power to subscribe was conferred on Wilkes County by the void Act.

Referring to the Act of February, 1879 (printed record, pages 14 and 16), the Circuit Court of Appeals said, in the leading opinion (printed record, page 116):

"The Act of February 20, 1879, which is recited in the bonds as authority for issuing them, definitely located this road running into Wilkes County. It does it by enacting that the convention ordinance shall be amended by adding certain words, which make it read, when so amended, as follows (see section as amended, page 115)."

"Section 2 of the Act of February 20, 1879, provides for convict labor being furnished for the purpose of constructing this second division; and section 4 provides *for bond subscriptions by any county in the State.* The act was invalid so far as it attempted to give power to the counties to create a debt, because it was not passed as laws for that purpose are required by the Constitution of North Carolina to be passed, but that invalidity does not affect the sections of the law which deal with other matters.

Rodman v. Washington, 122 N. C., 39 to 42.
Russell v. Ayers, 120 N. C., 180, 189.
Gambell v. McCrady, 75 N. C., 509.
Bank v. Commissioners, 119 N. C., 214.

"So far as now appears, the amendment locating the road into Wilkes County *was validly passed and became a valid law of North Carolina.*"

IF THE LEGISLATURE ALONE HAD THE POWER TO LOCATE THE LINE OR LINES TO BE CONSTRUCTED WEST OF WINSTON-SALEM, AND SUCH LOCATION BY VIRTUE OF A SIMPLE ENACTMENT, WAS TO BE CONSTRUED AS AUTHORITY TO A COUNTY TO CREATE A DEBT, THEN SUCH A STATUTE WAS IN VIOLATION OF ARTICLE II, SECTION 14, OF THE CONSTITUTION, AND VOID, IF NOT ENACTED AS THEREIN REQUIRED. THE LEGISLATURE CAN NOT DO INDIRECTLY WHAT IT IS PROHIBITED FROM DOING DIRECTLY. THE CIRCUIT COURT OF APPEALS FAILED TO ADVERT TO VARIOUS AMENDMENTS TO THE CHARTER OF 1868, WHICH ARE REFERRED TO IN THE RECORD. AMONG THE ACTS SO OVERLOOKED IS THE ACT RATIFIED FEBRUARY 3, 1869 (ACTS OF 1868-'69, CHAPTER 62), ENTITLED "AN ACT TO REPEAL AN ACT ENTITLED AN ACT TO AMEND AN ORDINANCE OF THE CONVENTION ENTITLED AN ORDINANCE TO INCORPORATE THE NORTHWESTERN NORTH CAROLINA RAILROAD COMPANY, AND TO

SUBSTITUTE THE FOLLOWING PROVISIONS FOR SAID ACT."

(See 4, *ante*.)

The second section of the last-named act provided for State aid to the first division of the road from Winston-Salem, for the Mount Airy division, and "for the purpose of aiding in the construction of the Yadkin Valley division of said railroad, running from Salem-Winston by way of Louisville, thence by way of Yadkinville, in the county of Yadkin, or within one and a half miles thereof." By this act it was provided that the State should loan the company twenty thousand dollars a mile to construct the road by way of Yadkinville. This act has never been repealed, in so far as it provides for a different route from Salem-Winston, westward.

THE ONLY LINES LOCATED BY THE LEGISLATURE BEYOND WINSTON-SALEM WERE, FIRST, THE MOUNT AIRY DIVISION, AND, SECOND, THE "YADKIN VALLEY DIVISION OF SAID ROAD RUNNING BY LEWISVILLE JUST NORTH OF THE YADKIN RIVER IN YADKIN COUNTY, THENCE CROSSING SAID RIVER SO AS TO PASS "BY WAY OF YADKINVILLE, IN THE COUNTY OF YADKIN, OR WITHIN ONE AND ONE-HALF MILES THEREOF, THENCE UP THE VALLEY OF THE YADKIN TO THE FOOT OF THE BLUE RIDGE, IN THE COUNTY OF CALDWELL."

It would appear by an examination of any official map, such as the map made by the Railroad Commission or the Agricultural Department of North Carolina (not by *ex parte* maps made for the appellees), that a line run from Yadkinville directly to Lewis' Fork of the Yadkin River, and thence to Coffey's Gap, which has been recently shown to be the only practicable location for a crossing of the Blue Ridge in Caldwell County, would leave Wilkesboro many miles to the north of such line and still would run up the valley of Lewis Fork, which is the valley of the Yadkin. It is a matter of universal

knowledge in North Carolina that the Carolina and Northwestern Railroad Company has been attempting to leave its completed line from Chester, in South Carolina, to Lenoir, in North Carolina, some miles south of Lenoir, in order to get a shorter and more direct route to Coffey's Gap, because that had been shown to be the best and cheapest route across the Blue Ridge, and that the Legislature, at the instance of the citizens of Lenoir, repealed, in March last, all authority theretofore given to that company to construct a connecting line from any point south of Lenoir to Coffey's Gap.

DID THE CHARTER, AS HELD IN THE OPINION OF JUDGE MORRIS (PRINTED RECORD, 114 TO 117), WITHOUT THE AID OF THE AMENDMENT OF 1879, EMPOWER WILKES COUNTY TO SUBSCRIBE TO THE STOCK OF THE COMPANY?

The Court said:

"It appears to us that it was the same railroad authorized by the Convention ordinance. That ordinance authorizes a railroad running by way of Salem and Winston to some point on the northwestern boundary line of the State, to be thereafter determined, and contemplated and provided for its being built by divisions, and enacted that the portion to Salem and Winston should constitute its first division. The piece of railroad for which the bonds in suit were issued does run from Salem and Winston in the general direction of the northwestern boundary line of the State, and, indeed, it seems evident that such a railroad to some point in the northwestern boundary line of the State must *pass near or through* Wilkes County."

So the argument of the Court that the charter locates the line rests entirely upon the ascertion that a line to the northwestern boundary of the State, which may intersect with that boundary anywhere from Alleghany County on the Virginia line to Mitchell County on the Tennessee line, "must pass," not through, but "near or through Wilkes County." We have seen from authorities cited above, that the Supreme Court of North Carolina has held for nearly a century that the word "near" is

too indefinite to fix the location of a line. The bonds were issued in contemplation of those decisions, and, surely, the Supreme Court of North Carolina did not lend countenance to the violation of the obligations of a contract, when it construed this charter in the light of its own line of decisions extending so far back. If that be true, then the provision of the Court is not tenable, unless it appears from the face of the map that such a line as contemplated by the charter must pass *"through Wilkes County."* We have seen that the line contemplated in the Act of February 3, 1869 (numbered 4 and printed, *ante*), marked out a line, the description of which can be fulfilled by running from the vicinity of Yadkinville through the northern part of Iredell and Alexander to the headwaters of Lewis' Fork, the principal source of the Yadkin River in Caldwell County, and thence up the valley of Wilson's Creek, in Caldwell County, to Coffey's Gap, where one company is now constructing, and two other companies have surveyed lines across the Blue Ridge. Shall it be said, in the face of these facts, that a State Court has interpreted its own statutes, with the purpose of violating the Constitution of the United States by impairing the obligation of a contract, and that a bare majority of the Federal Court of Appeals know so much about the geography and topography of North Carolina as to be able to rest its charge of bad faith on the part of the State Court upon its own contradictory findings as to the geography of the State?

It is properly conceded, in the opinion of the Court, that, in order to support its own conclusion, some legislation must be found, either in the charter or in some valid provision of an amendment thereto, fixing the location of the line beyond Winston-Salem. The appellants contend that such legislation must locate the line *"through Wilkes County,"* while the Circuit Court of Appeals insists that it is sufficient to find legislation, upon which it can find judicially the fact, that a line proposed *"must pass near Wilkes County."* "How near?" Within half mile, or within ten miles?

THE COURT FALLS BACK UPON THE VOID ACT OF 1879 TO FIX THE LEGISLATIVE LOCATION, WHICH IT IS NECESSARY TO DETERMINE BY SOME LEGISLATION.

The Court says (printed record, page 116):

"The Act of February 20, 1879, which was recited in the bonds as authority for issuing them, definitely located this road, running into Wilkes County. It does it by enacting that section 13 of the Convention ordinance shall be amended by adding certain words by making it read when so amended as follows."

The Court then adds section 13 as it purports to be amended, so as to locate another branch of the road "up the valley of the Yadkin by way of Jonesville and Wilkesboro, in the county of Wilkes, to Patterson's Factory, in the county of Caldwell, which branch shall be known as the second division."

Further discussing the Act of February 20, 1879, the Court said (printed record, page 116):

"This act was invalid so far as it attempted to give power to the counties to create a debt, because it was not passed as laws for that purpose are required by the Constitution of North Carolina to be passed, but that invalidity does not affect the sections of the law which deal with other matters.

Rodman v. Washington, 122 N. C., 39 to 42.
Russell v. Heirs, 120 N. C., 180 to 189.
Gamble v. McCrady, 75 N. C., 509.
Bank v. Commissioners, 119 N. C., 214."

If the foregoing proposition is sound law, then on the 19th day of February, 1879, Wilkes County was not empowered to subscribe to the capital stock of the company; but the void Act of the 20th of February, 1879, operated as a grant of power to subscribe by locating a line of railway in section 1, though the highest Courts, State and Federal, have pronounced section 4 of the act invalid.

The authorities cited sustain only the general proposition, that an act may be constitutional in part and unconstitutional in part; but fail to support the extraordinary conclusion, that, where the representatives of a county are unwilling to put their names upon record in favor of a statute allowing the county, in unmistakable terms, to create a debt, as required by Article 2,

section 14, of the Constitution, the Constitution of the State may be evaded by enacting that some railroad company, whose charter already authorizes counties along its line to subscribe to its capital stock, may build a new branch through a designated county, and thus confer the authority without complying with the requirement of the Constitution.

LONG BEFORE THE BONDS WERE ISSUED THE SUPREME COURT OF NORTH CAROLINA HAD DECIDED, IN UNIVERSITY v. HOLDING, 63 N. C. (FILED AT JUNE TERM, 1869) AND IN GALLOWAY v. THE CHATHAM R. COMPANY, 63 N. C., 147, THAT AN AMENDMENT TO A CHARTER, CREATING A NEW BRANCH TO A ROAD IN WHICH THE STATE ALREADY HAD AN INTEREST, DID NOT AUTHORIZE THE STATE TO SUBSCRIBE TO THE CAPITAL STOCK, AS A RAILROAD IN WHICH THE STATE HAD AN INTEREST. IT FOLLOWS, THAT THE CONSTITUTIONAL RESTRICTION AS TO COUNTIES CAN NOT BE EVADED BY ATTEMPTING TO CREATE A BRANCH OF AN EXISTING ROAD IN THE SAME WAY.

The foregoing proposition is sustained by the following extract from those opinions read in connection with the amendments to the charter of the Chatham Railroad Company, construed in said decision and appended to this brief as Exhibits "A," "B," "C," "D," "E," "EE" and "F."

ANALOGY BETWEEN THE CHERAW BRANCH OF THE CHATHAM RAILROAD AND THE WILKESBORO BRANCH OF THE NORTHWESTERN.

The Act of August 3, 1868 (printed as Exhibit "D" to this brief), authorized the Chatham Railroad Company "*to extend their road from the graded terminus at or near Haw River, to the South Carolina State line, near Cheraw, the most approved route to be determined by the directors and president of said road: Provided, that this privilege shall not be construed to relieve*

said company to build their road to the Gulf in Chatham County."

The Act of the 20th of February, 1879 (Exhibit "E," page 17, of the Wilkes printed record), amended section 13 of the charter (page 15 of the Wilkes printed record), so as to make it read as follows (the words added to said section by the act of 1879 being italicised):

"That the company shall have power to construct branches of said road, one of which shall run from the towns of Winston and Salem by way of Mount Airy, in Surry County, to the line of the State of Virginia, *and one of which shall be constructed from the towns of Winston and Salem, up the Valley of the Yadkin, by way of Jonesville and Wilkesboro, in the county of Wilkes, to Patterson's Factory, in the county of Caldwell, which branch shall be known as the second division.*"

It thus appears that the amendment providing for the Cheraw branch authorized the Chatham Railroad Company to construct it as located in the act, while the act of 1879 *required* the construction of the branch therein provided for by way of two designated points, Jonesville and Wilkesboro, to another fixed terminus, Patterson's Factory. The *charter of the* Northwestern had, in terms, purported to empower the company to adopt the line via Jonesville and Wilkesboro and Patterson's Factory, or any other line, as a location of one of its branches, *but did not require, as the act of the 20th of February, 1879, did,* that a branch should be so located under the indefinite authority to run to termini anywhere "in that section." On the other hand the Chatham Company was empowered to run to *"termini at any point or points in the said coal field region,"* and under this general authority might have extended the line from a point above Gulf, as its successor, the Raleigh and Augusta Air Line, subsequently did, to Hamlet, or further south (the whole territory being within what was known as the coal fields region, though still but partially developed); but, like the Northwestern, it asked and obtained specific power to construct a line to a designated point.

THE COURT DECLARED THAT THIS CHERAW BRANCH WAS NOT A PART OF THE ORIGINAL LINE, UPON WHICH WORK HAD BEEN DONE PRIOR TO THE ADOPTION OF THE CONSTITUTION AND IN WHICH, PRIOR TO THAT TIME, APRIL 24th, 1868, THE STATE HAD PECUNIARY INTEREST.

Justice Rodman, delivering a concurring opinion, said, in *Galloway v. Chatham Railroad Company*, 63 N. C., at page 158:

"The Chatham Railroad, *between the termini and the route established by previous legislation, was an unfinished road in the legislative meaning of the phrase; but the road which was to start from one of the termini of the Chatham Railroad, or from some point on it, and run thence to Cheraw, was a road which was unfinished, in the sense that it had never been begun, but not in the sense contemplated by the Constitution, which meant only to include those roads which had been begun, but were unfinished at its adoption.* We are obliged to give this meaning to that phrase in the Constitution, as any other construction would render it totally ineffective, and defeat any policy which it may be supposed it was intended to enforce."

To the same purport is the language of Chief Justice Pearson, at the bottom of page 155, which has already been quoted, where he suggests as a reason moving the Legislature to make unfinished or incomplete roads an exception to the general rule, that it was to prevent a sacrifice of work already done.

Judge Rodman said explicitly what was admitted, *that the Chatham Railroad "between the termini* of the route established by previous legislation was an unfinished road." That road had been graded to a point near Gulf in Chatham County before the Constitution was ratified, and the act to extend the Chatham Railroad, ratified the 3d of August, A. D. 1868 (attached to this brief as Exhibit "D" and referred to on page 148), authorized the company "to extend their road from *the graded terminus at or near Haw River* to the South Carolina State line near Cheraw." The road between Greensboro and

Winston-Salem was not finished till 1873, but it appears from the affidavits of Rufus Harmon and W. H. Watkins (printed record of Wilkes case, pages 82 and 83), that some grading was done on that part of the line in October or November, 1868.

THE STATE COULD NOT HAVE LOANED ITS CREDIT FOR THE CONSTRUCTION OF THE WILKESBORO BRANCH, THOUGH IT APPEARS FROM THE LEGISLATION (THE CHARTER, SECS. 5 AND 8, PAGES 13 AND 14, WILKES PRINTED RECORD, AND THE ACT OF FEB. 3, 1868, ATTACHED TO THIS BRIEF AS EXHIBIT "G") THAT ITS CREDIT WAS GIVEN OR LOANED IN FAVOR OF THE LINE FROM GREENSBORO TO WINSTON-SALEM.

It appears from sections 5 and 8 of the charter, and sections 1 and 2 of the act of February 3, 1869, that the faith of the State was first pledged by the charter to pay $50,000 for the completion of every five miles between Greensboro and Winston-Salem (see secs. 5 and 8, Wilkes printed record, pages 13 and 14), and that subsequently it was provided (in sec. 1 of the Act of February 3, 1869, Exhibit "G," attached to this brief), that "to aid the Mount Airy Division of the Northwestern North Carolina Railroad, from Salem in Forsyth County, to Mount Airy in Surry County, and the first division of said road, from Greensboro to Winston-Salem," when the president and chief engineers should certify to the Governor that $150,000 had been subscribed and five per cent paid in, the Governor should direct the Treasurer to loan the company $20,000 per mile. In sec. 2 of the same act, a similar subscription of the same amount, and upon like conditions, was authorized by the State:

"*For the purpose of aiding in the construction of the Yadkin Valley Division of said railroad, running from Salem and Winston, by way of Lewisville, thence by way of Yadkinville, in the county of Yadkin, or within one and one-half miles*

thereof, thence up the Valley of the Yadkin to the foot of the Blue Ridge in the county of Caswell."

STATE AID WOULD NOT HAVE BEEN GRANTED TO THE BRANCH BY JONESVILLE TO WILKESBORO IF IT HAD BEEN APPLIED FOR UNDER THE RULE LAID DOWN IN GALLOWAY v. RAILROAD, *SUPRA*.

If, after the passage of the Act of February 3, 1869, State aid had been asked for a new branch, located by the company under the general power in the charter to build branches and not under an amendment to the charter requiring such location, from Winston-Salem via Jonesville and Wilkesboro to Patterson's Factory, the Supreme Court would have felt constrained to follow the ruling in *Galloway v. Railroad*, that this was not a part of an unfinished road, but a new line, because any other construction would defeat the policy of the State in imposing restrictions. (See 63 N. C., page 158.)

To concede the right of the State to have subscribed and paid $20,000 per mile on a branch so located under the authority given in the original charter, would be equivalent to admitting that the company was empowered to locate any line, in any direction, with Winston-Salem as a centre, to the circumference of a circle described by a radius from said centre not long enough to extend beyond the borders of the State, and to bind the State by its contract to give pecuniary aid. Such a construction would manifestly defeat the policy of the State by opening the way to evade all restrictions, either upon the legislative branch of the government or its municipal agencies, in creating debts to build railroads. If such a branch located between February 3, 1869, and February 20, 1879, would have been a new road, and not an unfinished road, under Article V, section 4, of the Constitution, it would follow that it would not have been an incomplete road, but one which had not been begun in construing the Act of 1869. (The Code, secs. 1996 to 2000.)

On the other hand, if, as we think is clearly the correct view, the Wilkesboro branch was, like the Mount Airy division, sim-

ply a branch, but differing from the Mount Airy branch in that the Act of 1879 fixed its location, just as the Act of August 3, 1868 (Exhibit "D," hereto attached), which marked out a new terminus for the Chatham road, was construed to have created a new line distinct from the Chatham road, though the Chatham Railroad Company was authorized by a charter accepted before the 24th of April, 1868, to extend its road to termini anywhere within the coal field region, and the State was bound by its contract to lend its aid in building to such termini. The charters of both the Chatham Railroad and the Northwestern North Carolina Railroad Company were accepted before the Constitution took effect in 1868, and constituted contracts of the State not subject to alteration or repeal by the Legislature, under Article VIII, section 1, of the Constitution of 1868.

THE CONTRACT WITH THE NORTHWESTERN NORTH CAROLINA RAILROAD COMPANY RECOGNIZED BY THE LEGISLATURE.

Under the provision of chapter 100, Acts of 1869-'70, ratified March 22, 1870 (Exhibit "H," hereto attached), the charter was so amended as to permit the company to issue mortgage bonds constituting a first lien upon its franchise and property, and to provide that the mortgages theretofore executed by the company to secure the payment of State aid bonds should subside into a second mortgage. (See Exhibit "H," hereto attached.)

Subsequently the company was permitted, by Act of March 31, 1871, to consolidate with any connecting line. (See Exhibit "I," hereto attached, and also Laws of 1870-'71, chap. 178.)

Still later, under the provision of the act ratified January 3, 1872, the State accepted the return of its bonds by the company and agreed to cancel and surrender the mortgages executed by the Company to secure the State "whenever the president of the said Northwestern North Carolina Railroad Company shall certify to the Treasurer of the State of North Carolina *that this act had been accepted as an amendment of the charter of said company, said Treasurer shall forthwith cancel both of*

the mortgages aforesaid and deliver the same so cancelled, etc." The State thus recognized its contractural relations existing between it and the company.

IT CAN NOT BE SUCCESSFULLY CONTENDED THAT THE LINE BY JONESVILLE AND WILKESBORO IS THE MAIN LINE FOR SEVERAL REASONS.

First, because section 2 of the Act of February 3, 1869 (attached as Exhibit "G"), located the *"Yadkin Valley division, running from Winston-Salem by way of Lewisville, thence by way of Yadkinville, in the county of Yadkin, or within one and one-half miles thereof, thence up the valley of the Yadkin to the foot of the Blue Ridge, in the county of Caldwell,"* and marked it out as the main line, running towards the northwestern boundary of the State (as contemplated in section 1 of the charter, Wilkes printed record, page 12), by providing for its construction by State aid. *This act has never, directly or by implication, been repealed in so far as it locates the division extending to the Blue Ridge,* while subsequent legislation recognized it as a part of the charter, by prohibiting the surrender of mortgages executed under it till the State Treasurer should be assured of the adoption by the company of the modifying act. (See Exhibit "J," section 1, chapter 5, Act of 1871-'72, hereto attached.)

Second, because the line from Winston-Salem to Lewisville, and thence to Yadkinville, would cross to the south side of the Yadkin River, a distance of more than ten miles, and in running thence to the headwaters of the Yadkin River at the foot of the Blue Ridge, would be at all points further from the line of the Wilkesboro branch than the Mount Airy line is from the road from Winston to Jonesville, and will extend to a point at the foot of the Blue Ridge and further west than Patterson. *We submit confidently the statement that there is no evidence whatever to show that the road to Wilkesboro was ever marked out by the State, or by the company, or designated as the main line, while, on the other hand, the State marked the line by way of Yadkinville as that to which it would give pecuniary aid, and the company accepted that proposition as an amendment to its*

charter, which amendment has never been repealed. If the appellees contend that the line by Yadkinville has never been built, and is therefore abandoned, we answer that the right to extend the Wilkesboro branch to Patterson's Factory is not to be deemed abandoned, because it has not yet been exercised.

Third, because, when the Legislature amended the charter by *requiring* that a branch should be constructed by Jonesville and Wilkesboro, it proceeded, in the same act (of February 20, 1879), to clothe the counties along the line marked out, *in terms*, with power to subscribe, just as if creating a new and distinct line. In determining what construction should be given to the Act of February 20, 1879, the Court, under the rulings in North Carolina, must respect the views of the Legislature as indicated by the terms of that statute.

In an opinion given by the majority of the Supreme Court of North Carolina, at the request of the Governor, in reference to the tenure of office of two members of the Court, the following language was used:

"Courts are extremely reluctant likewise to disturb or modify any construction that has been given by the Legislature to statutes or provisions of constitutions since their enactment. Where business relations have been heretofore adjusted or rights to offices have been recognized as settled by the legislative sanction so given to a particular construction of doubtful language, courts are even more averse to disturb or overrule the principle which has been accepted and acted upon by the public, because it had the approval of the lawmakers, whose power to enact or modify statutes is limited only by the Constitution, and whose interpretation of the organic law is entitled to such profound respect that it will be disturbed by the courts only on the weightiest consideration." 114 N. C., at page 925.

Fourth, the amendment to the charter, marking out the main line to the west by way of Lewisville and Yadkinville, has become a part of a contract under the doctrine first established in the Dartmouth College case, and can not be modified except by act of the Legislature, approved by the stockholders of the company in a lawful meeting. Before the adoption of the Constitution in 1868, the Legislature had reserved no power to amend

the charters of private corporations, and hence that doctrine applied to all charters granted before the 24th of April, 1868.

Replying to a request for advice in the House of Representatives as to whether an amendment to the charter of the North Carolina Railroad, granted in 1848, would become operative upon the approval of the Board of Directors of the company, the Court said:

"The provisions in section 6 of the bill submitted to us, which makes the validity of a lease dependent upon its acceptance by the board of directors, would be an amendment of the charter transferring power from the stockholders, and invalid unless accepted by the stockholders in general or special meeting assembled."

120 N. C., at pages 624 and 625.

The recitation in subsequent amendments to the charter show that the amendment numbered 4, *ante*, and describing the proposed line by Lewisville and Yadkinville was made valid by being accepted by the stockholders. The foregoing extract from the Letter of Advice from the Supreme Court to the Legislature (pages 624, 625), shows that where charters were granted, as in this case, before the adoption of the new Constitution reserving to the Legislature the right to alter charters, the charters were held to be contracts which could not be altered without the assent of the company to the amendment proposed by the Legislature.

Attention is called to the amendments to the charter of the Chatham Railway, referred to in *Galloway v. Railroad* and *University v. Holding, supra.*

A. C. AVERY.

APPENDIX.

EXHIBIT "A."

[Chapter 129, Laws 1860-'61.]

An act to incorporate the Chatham Railroad Company.

SECTION 1. Be it enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by the authority of the same, that a company is authorized to be formed, with a capital stock of eight hundred thousand dollars, to be divided into shares of one hundred dollars each, to be called and known as the "Chatham Railroad Company," for the purpose of building and constructing a railroad with one or more tracks, to be used with steam and other motive power, from the coal fields in the county of Chatham through said county to Raleigh, or some point west of Raleigh not exceeding twelve miles, the nearest and most practicable route; and such company when formed as hereafter directed, shall have power to receive, possess, own and transfer real and personal property, to have common seal, and to pass such by-laws, not inconsistent with the laws of this State, as may be necessary to carry out the object of the corporation; shall be capable in law of suing and being sued, pleading and being impleaded, and shall have and enjoy all the rights of other corporate bodies under the laws of this State; to condemn land for right-of-way, and all other purposes necessary to carry into effect the purposes of said company; and shall generally have and possess all the rights, privileges and immunities, and be subject to the limitations and restrictions of corporate bodies in this State; and shall have the exclusive right to transfer and carry persons, produce, merchandise and minerals on and along such railroad at such prices as they may fix.

SEC. 2. Be it further enacted, that for the purpose of creating the capital of such company, John C. Stone, Henry A. London, Frank Page, K. P. Battle, O. A. Taylor, T. D. Hogg,

R. S. Tucker, W. P. Taylor William Hogan Jones and Elias Bryan are hereby appointed Commissioners whose duty it shall be, as soon after the passage of this act as may be, to appoint such Commissioners to open books of subscription at such places and at such times as to them shall seem best, and under such rules and regulations as they may prescribe.

SEC. 3. Be it further enacted that whenever the sum of one hundred thousand dollars shall have been subscribed to the capital stock of said company by solvent subscribers, it shall be the duty of the Commissioners aforesaid to call a general meeting of the stockholders, after giving such notice as to them shall seem sufficient, and at such times and places as they shall determine; and at all general meetings of said stockholders not less than a majority of all the stock subscribed shall constitute a quorum for the transaction of business, and said stockholders, when so met in general meeting, shall have power, and it shall be their duty, to elect a president and five directors for said company; and in electing such president and directors, and in enacting such by-laws as may be necessary, each share of stock represented, either in peron of by proxy, shall be entitled to one vote: *Provided*, if a majority of such stockholders shall not attend said first general meeting, such as do attend and are present may adjourn from time to time until a majority shall appear.

SEC. 4. Be it further enacted that it shall be the duty of said stockholders, at their first general meeting, to prescribe the manner and time in which payments of stock on the subscription books shall be made: *Provided*, not more than one-half of said subscription shall be called for in one year after said first general meeting.

SEC. 5. Be it further enacted, that it shall be the duty of the president and directors of said company to appoint a treasurer, who shall remain in office such length of time as the company in their by-laws shall determine; and said president and directors shall remain in office one year, and until others are chosen, and shall have a general direction and management of the affairs of said company, and shall appoint some suitable person as engineer whose duty it shall be to make the necessary sur-

veys for the location of said railroad, and furnish the president and directors with such survey or surveys, and estimates of the cost; said directors shall have power to fill any vacancy that may occur in their board, and, in the absence of the president, to elect one for the time; they shall also appoint a secretary, whose duty it shall be to keep a fair and correct record of the proceedings of said board, and of all the proceedings of the stockholders in general meeting, in a book to be provided for that purpose.

SEC. 6. Be it further enacted, that the president or Board of Directors shall at least once a year make a full report on the state of the company and its affairs to a general meeting of the stockholders, and oftener, if required by any by-law of the company; and also (call) a general meeting of the stockholders whenever they may deem it expedient, and the company may provide in their by-laws for occasional metings being called, and prescribe the mode thereof.

SEC. 7. Be it further enacted, that all persons, the Justices of the County Court, or the authorities of any incorporation, shall have full power and authority to subscribe to the capital stock of said company to the amount they shall be authorized to do by the inhabitants of said county or any incorporated town, or the proper authorities of any corporation, to the amount they shall be authorized to do by the inhabitants of said county or town; and they (may) issue bonds or other evidences of debt to enable them to borrow money to pay such subscription; the said subscription to be made by any agent or agents of such county, town or corporation properly authorized by them to make the same, when so made, shall be binding on such county, company or corporate body in the same manner and to the same extent that it is on the individual subscribers, and such body corporate or company, or county shall be represented in all general meetings of the stockholders.

SEC. 8. Be it further enacted, that if the capital stock of said company, as authorized by this charter, be insufficient to carry out the purposes of the same, it may be increased by said company to one million two hundred and fifty thousand dollars.

SEC. 9. Be it further enacted, that said company may begin

the construction of said road at any point on the line of location according to their discretion, and that for any portion of said road actually constructed the said company shall be entitled to all the privileges of this act into and over such part so constructed.

SEC. 10. Be it further enacted, that this act shall be in force from its ratification. (Ratified the 15th day of February, 1861.)

EXHIBIT "B."

An ordinance in addition to and amendment of an act of the General Assembly, ratified the 15th day of February, 1861, entitled "An act to incorporate the Chatham Railroad Company," and to repeal an act supplemental thereto, ratified the 23d day of February, 1861.

1. Be it ordained by the delegates of the people of North Carolina in Convention assembled, and it is hereby ordained by the authority of the same, that section first of an act of the General Assembly, ratified the fifteenth day of February, one thousand eight hundred and sixty-one, entitled "An act incorporating the Chatham Railroad Company," be amended by inserting after the words "from the coal fields in the county of Chatham, through said county," the words "connect with the North Carolina Railroad at," so as to make the section read "to connect with the North Carolina Railroad at Raleigh, or some point west of Raleigh, not exceeding twelve miles."

2. Be it further ordained, that the *proviso* in section four of said act of the General Assembly be stricken out.

3. Be it further ordained, that an act of the General Assembly, ratified on the 23d day of February, one thousand eight hundred and sixty-one, entitled "An act supplemental to an act passed at the present session of the General Assembly, entitled 'An act to incorporate the Chatham Railroad Company,'" be and the same is hereby repealed and abrogated.

4. Be it further ordained, that all such solvent corporations as may or shall subscribe to the capital stock of the said Chatham Railroad Company may make their bonds payable to the Public Treasurer of the State of North Carolina for the amount of their subscriptions to said capital stock, and no more; which said bonds are to be signed by the presidents and under the seals respectively of said corporations, and made for any sums not under five hundred dollars each, to bear interest at the rate of six per cent per annum, which interest is to be paid semi-annually, to-wit, the first Monday in January and July in each and every year; and the principal of said bonds to be made payable twenty years after date; and these bonds, so authorized to be made, may be deposited with the Public Treasurer of the State, who shall then issue and deliver to the several corporations so subscribing and depositing their bonds as aforesaid, the coupon bonds of the State of North Carolina, to the amount of their subscriptions respectively, and made for the sums of five hundred dollars and one thousand dollars, to bear interest at the rate of six per cent per annum, which interest is to be paid semi-annually, on the first Monday in January and July in each and every year, and the principal of said bonds to be made payable twenty years after date: *Provided,* that said bonds shall not exceed, in the aggregate, the sum of eight hundred thousand dollars: *And provided also,* that said Chatham Company shall execute and deliver to the Governor of the State of North Carolina a deed of mortgage, under the seal of said company, wherein and whereby shall be conveyed to the Governor and his successors in office, for the use and benefit of the State, all the estate, both real and personal, belonging to said company, or in any manner pertaining to the same, conditioned for indemnifying and saving harmless the State of North Carolina from the payment of the whole or any part of the bonds of the State authorized by this ordinance to be made by the Public Treasurer, and delivered to the several corporations subscribing as aforesaid to the capital stock of said Chatham Railroad Company. In addition to the deed of mortgage hereinbefore required to be executed and delivered by the Chatham Railroad Company, the State of North Carolina shall, by this ordinance,

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have a lien upon the estate, both real and personal, of said company, which they may now have or may hereafter acquire, to secure the principal and interest of the bonds of this State authorized to be issued as aforesaid.

5. Be it further ordained, that said bonds of the State, so made by the Public Treasurer, shall be received by the said Chatham Railroad Company in payment of subscriptions made as aforesaid by such corporations to the capital stock of said Chatham Railroad Company.

6. Be it ordained, that said corporations so subscribing and depositing their bonds as aforesaid with the Treasurer of the State, shall be allowed to redeem their bonds at any time before maturity, in the currency of the State, on giving thirty days' notice to the Treasurer of this State of their intention so to do.

7. Be it further ordained, that the said railroad may *be constructed with termini at any point or points in the said coal fields region that the stockholders in said company may agree upon, with the approbation of the Board of Internal Improvements.*

8. Be it further ordained, that the corporate authorities of incorporated towns subscribing to the capital stock of said Chatham Railroad Company, in order to provide for the payment of their subscriptions, and of the principal and interest of bonds for that purpose by them issued, shall have authority to lay and collect taxes from all subjects which, under the charters of said towns, are taxable.

9. Be it further ordained, that the solvency of such corporations as may desire to subscribe to the capital stock of said Chatham Railroad Company shall be judged of by the Board of Internal Improvements.

10. Be it further ordained, that all laws and parts of laws, all acts and parts of acts, inconsistent with the provisions of this ordinance are hereby repealed and abrogated.

(Ratified the 30th day of January, 1862.)

EXHIBIT "C."

(Ordinance of Convention 1868, Chapter 19.)

An ordinance to amend the charter of the Chatham Railroad Company.

SECTION 1. Be it ordained by the people of North Carolina in Convention assembled, that to enable the Chatham Railroad Company to finish its road, the Public Treasurer is hereby authorized and directed to deliver to the president and directors of the said railroad company the coupon bonds of the State to an amount not exceeding twelve hundred thousand dollars ($1,200,000), signed by the Governor, countersigned by the Public Treasurer, and sealed with "the Great Seal of the State," bearing six per cent interest, the principal payable at the end of thirty years from the date thereof, and the coupons of interest payable semi-annually, in such form as the Public Treasurer may direct, to be made payable at such time and place as may be agreed upon by the Public Treasurer.

SEC. 2. Be it further ordained, that before the Public Treasurer shall deliver any of said bonds hereby authorized, the said Chatham Railroad Company (shall deposit) with the Public Treasurer the coupon bonds of said company for the same amount, and bearing the same interest and date, the principal and coupons payable at the same time and place as those of the State hereinbefore directed to be issued and paid over to the Chatham Railroad Company, and to secure the principal and interest of by the Chatham Railroad Company, the State of North Carolina shall, by this ordinance, have a lien upon all the estate of said company, both real and personal, which they may now have or may hereafter acquire, between the city of Raleigh and the Gulf, the terminus of said railroad in the coal fields, including that at both points, together with all the rights, franchises and powers thereunto belonging or appertaining, or that may hereafter belong or appertain to said company which lien shall be more effectually secured by a first mortgage duly executed by said company to the State, and registered in the

Register's office in the counties of Wake and Chatham, and in case of failure of said company to pay the semi-annual interest on its bonds for twenty-four months after such interest shall become due, or to pay the principal of said bonds for twelve months after their maturity, the Board of Internal Improvements, for and in behalf of the State, may enter upon and take possession of all the property hereinbefore specified and dispose of the same by sale so as to protect the State.

SEC. 3. Be it further ordained, that the Chatham Railroad Company may, at any time before maturity, take up the bonds of the company deposited with the Public Treasurer by substituting in lieu thereof coupon bonds of the State, or other indebtedness of the State.

SEC. 4. Be it further ordained, that the State shall have the privilege, at any time within eight years from the passage of this ordinance, to subscribe stock in said company to the amount of six hundred thousand dollars ($600,000), in shares of one hundred dollars ($100.00) each, and upon certificate of stock being issued to the State by said company for the same, to surrender the bonds of said company which had previously been delivered to the State under the provisions of this ordinance.

SEC. 5. Be it further ordained, that this ordinance shall take effect and be in force from and after its passage.

Ratified this 11th day of March, A. D. 1868.

CALVIN J. COWLES, *President.*

T. A. BYRNES, *Secretary.*

EXHIBIT "D."

(Private Laws of Special Session of 1868, of the General Assembly of North Carolina, Chapter 7.)

An Act to extend the Chatham Railroad.

The General Assembly of North Carolina do enact:

SECTION 1. That the Chatham Railroad Company is hereby authorized to extend their road from the graded terminus at or near Haw River, to the South Carolina State line, near Cheraw, the most approved route to be determined by the presi-

dent and directors of said road: *Provided*, that this privilege shall not be construed to relieve said company from the obligation to build their road to the Gulph in Chatham County.

SEC. 2. The Chatham Railroad Company shall not expend any money on that portion of the line south of the intersection with the Western Railroad, except for the survey and location of the same, until that portion of its line between its junction with the North Carolina Railroad and its intersection with the Western Railroad is completed and in operation, with sufficient rolling stock and suitable depot, freight and engine buildings and machine shops, nor until the obligation expressed in *proviso* in section one of this act shall have been discharged.

SEC. 3. This act shall go into effect and become a part of the charter of the Chatham Railroad Company as soon as accepted by a majority of the stockholders of said company at any regular or called meeting thereof, and such acceptance shall be certified to the Governor of the State by the president of the company, under the seal of the corporation.

Ratified the 3d day of August, A. D. 1868.

EXHIBIT "E."

(Private Laws of Special Session of 1868, of the General Assembly of North Carolina, Chapter 14.)

An Act to amend the charter of the Chatham Railroad Company.

The General Assembly of North Carolina do enact:

SECTION 1. That to enable the Chatham Railroad Company to finish their road, the Public Treasurer is hereby authorized and directed to deliver to the president of the said railroad company, the coupon bonds of the State, of one thousand dollars ($1,000) each, to an amount not exceeding two million dollars ($2,000,000), signed by the Governor, countersigned by the Public Treasurer, and sealed with the Great Seal of the State, bearing six per cent interest, the principal payable at the end of thirty years from the date thereof, and the coupons of interest payable semi-annually in such form as the Public Treasurer

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may direct, principal and interest payable at such time and place as he may prescribe.

SEC. 2. Before the Public Treasurer shall deliver any of the said bonds hereby authorized, the President of said Chatham Railroad Company shall deposit with the Public Treasurer the coupon bonds of the company, signed by him and sealed with the company's seal for the same amount, and bearing the same interest and date. The principal and coupons payable at the same time and place as those of the State hereinbefore directed to be issued and paid over to the said company, and to secure the principal and interest of said bonds, issued by the company, the State of North Carolina shall have, by this act, a lien upon all of the estate of the same, real or personal, which they may now have, or may hereafter acquire, between the point of intersection with Western Railroad and the South Carolina State line, including that at both points, together all the rights, franchises and powers thereunto belonging, or that may hereafter belong to said company, in respect of that portion of their line, which lien shall be more effectually secured by a first mortgage duly executed by said company to the State, and registered in the Register's office of the county of Wake and in the office of the Secretary of State, and in case of the failure of said company to pay the semi-annual interest on their bonds for twenty-four months after such interest shall become due, or to pay the principal of said bonds for twelve months after their maturity, the Board of Internal Improvements, for and in behalf of the State, may enter upon and take possession of all the property hereinbefore specified and dispose of the same by sale, so as to protect the State.

SEC. 3. The Chatham Railroad Company may, at any time before maturity, discharge the bonds of said company deposited with the Public Treasurer by substituting in lieu thereof coupon bonds of the State, or other indebtedness of the State, or payment in national currency.

SEC. 4. That any railroad company within this State shall be at liberty to take or purchase stock in, or lend money to, or purchase bonds of this or any other railroad company in this or any adjoining State.

SEC. 5. This act shall be in force from and after its ratification.

Ratified the 15th day of August, A. D. 1868.

EXHIBIT "EE."

CHAPTER VII.

An Act to re-enact and confirm certain acts of the General Assembly authorizing the issue of State bonds to and for certain railroad companies.

WHEREAS, Doubts have been raised as to the validity of bonds of the State issued to and for certain railroad companies under acts whose titles are hereinafter recited; and whereas, it is the purpose of this General Assembly to place the validity of such bonds beyond question; now, therefore,

The General Assembly of North Carolina do enact:

SECTION 1. That an act entitled "An act to amend the charter of the Williamston and Tarboro Railroad Company," ratified the seventeenth day of August, *Anno Domini* eighteen hundred and sixty-eight, and an act entitled "An act to amend the charter of the Western North Carolina Railroad Company," ratified the nineteenth day of August, *Anno Domini* eighteen hundred and sixty-eight, and all the provisions thereof be and the same are hereby re-enacted and in all things confirmed, and they are hereby constituted part of this act; and all bonds of the State heretofore made and issued to and for the railroad companies and for the purposes in said act specified, and in pursuance of the same, are hereby ratified and made good to all intents and purposes as if issued under and in pursuance of the provisions of this act.

SEC. 2. That on the surrender of any of the bonds heretofore issued under and by virtue of any one of said acts, the Treasurer is hereby authorized and required to issue and substitute new bonds of the State, of like tenor and date, executed in like manner and in all respects similar, for such bonds so surrendered, except that such new and substituted bonds shall be

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issued and purport to be issued under and by virtue of this act, and the bonds so surrendered shall be burnt by the Treasurer in the presence of the Governor and Auditor, who shall cause to be made and sign a certificate specifying the number and dates of such bonds so burnt, and the acts under which the same were issued, and the Treasurer shall report such action and certificate to the General Assembly.

SEC. 3. In order to provide for the payment of the interest that may from time to time accrue upon such bonds so issued under said acts, and the bonds to be issued and so substituted under this act, there shall be annually levied and collected a special tax of one-thirtieth of one per cent on the taxable property of the State to pay the interest that has accrued and may, from time to time, accrue on the bonds so issued and so to be issued to and for the said Williamston and Tarboro Railroad Company, and a like special tax shall be annually levied and collected of one-twentieth of one per cent on all taxable property of the State to pay the interest that has accrued and may, from time to time, accrue on the bonds so issued and so to be issued to and for and on account of the said the Western North Carolina Railroad Company.

SEC. 4. The Public Treasurer is hereby directed, whenever the president of the Chatham Railroad Company shall certify that the grading of the road between Cheraw, in South Carolina, and the Gulf, or some other point on the Chatham Railroad, between Raleigh and the Gulf, has been let to contract, to subscribe to the capital stock of said company two million dollars in behalf of the State, which subscription shall be paid by delivering to the president of said company coupon bonds of the State at par of the denomination of one thousand dollars, dated October first, eighteen hundred and sixty-eight, and payable in thirty years thereafter, bearing six per cent interest, payable semi-annually, principal and interest payable in the city of New York, said bonds to be signed by the Governor, countersigned by the Treasurer, and sealed with the "the Great Seal of the State," and issued under the provisions of chapter ninety, Revised Code: *Provided,* that said bonds shall only be issued on the surrender of a like amount of bonds of the State

heretofore issued under an act to amend the charter of the Chatham Railroad Company, ratified the fifteenth day of August, eighteen hundred and sixty-eight. On which surrender the same amount of bonds delivered by said company to the State under the said act shall be cancelled. Said subscription shall be preferred stock, and pay a dividend of six per cent before any dividend shall be declared on the other stock.

SEC. 5. In order to provide for the payment of the interest which may accrue on the bonds issued as above mentioned, there is hereby and shall be annually levied and collected a special tax of one-twentieth of one per cent on the taxable property of the State, collectable and payable into the Treasury as other public taxes.

SEC. 6. In all meetings of stockholders of said company the State shall, for and in behalf of its stock, be entitled to a vote equal to one-third of that cast by individual stockholders, and all the officers of said company shall be elected by the stockholders as heretofore.

SEC. 7. The capital stock of said Chatham Railroad Company is hereby increased to three million two hundred thousand dollars.

SEC. 8. This act shall be in force from its ratification.

Ratified the 18th day of December, A. D. 1868.

EXHIBIT "EE."

CHAPTER CLXXII.

An act to enable the Chatham Railroad Company to complete its road.

SECTION 1. That for the purpose of supplying funds to enable the Chatham Railroad Company to complete and equip its road, the said company shall have power to borrow money, by the issue of bonds or other evidences of debt, authenticated in such manner as the president and directors of said company may deem best, in sums not less than five hundred dollars, at a rate of interest not exceeding eight per cent, principal and interest payable at such time and place as said president and di-

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rectors may select, the bonds so issued not to exceed two millions of dollars.

SEC. 2. To secure the payment of these bonds and other evidences of debt issued as aforesaid, and the interest thereon, the said Chatham Railroad Company may execute and deliver mortgage deeds or deeds in trust, signed by the president and countersigned by the Secretary of said company, conveying its franchise and property, including its road-bed, superstructure, choses in action, and real and personal estate of whatever kind, to the holder of said bonds, or to such parties as said president and directors my select, in trust for them, and the deeds so executed and registered in the county of Wake shall have priority over any lien or other claim held by this State on the subject matter conveyed, it being the intent and meaning of this act that the State shall be in the position and have the rights of a second mortgage, subordinate to the liens created by the mortgage or trust deeds aforesaid: that before the said Chatham Railroad Company shall make or sell any portion of the first mortgage bonds authorized by sections one and two of this act, they shall deliver to the Public Treasurer a second mortgage upon all their estate, both real and personal, which they may now have, or may hereafer acquire, between the city of Raleigh and the terminus of said railroad to the South Carolina line, at or near Cheraw, South Carolina, said second mortgage bonds to be in all other respects the same as the first mortgage bonds now held by the State, bearing the same interest and payable in the same manner; and the president of the said Chatham Railroad Company shall also deposit with the Public Treasurer the sum of one hundred and forty-four thousand dollars of first mortgage bonds, to be applied to the payment of the interest on the second mortgage bonds.

SEC. 3. Any county along the line of the said Chatham Railroad may subscribe to the capital stock of the company, to such amount as a majority of the Commissioners of said county may determine, subject to the approval of a majority of the qualified voters of the county; and said Commissioners, in order to pay the said subscription, shall have power to issue bonds or other evidences of debt, at a rate of interest not to exceed eight per cent per annum; said bonds to be issued in such manner

and form, payable at such time and place, and authenticated in such manner as they may determine.

SEC. 4. In order to pay the principal and interest of the bonds issued as aforesaid, the Commissioners of the county, subscribing as above mentioned, shall levy and collect annually, in such manner as is directed by law in case of taxes for other county purposes, a tax sufficient to pay the annual interest, and they may levy and collect a further tax to be used in extinguishment of the principal, or else to be invested as a sinking fund for the ultimate redemption of the principal.

SEC. 5. No subscription shall be made by the Commissioners of any county as above mentioned until the question of approval or disapproval of such subscription, the issue of bonds or other evidences of debt, and the authority to levy taxes to pay the interest and provide for payment of the principal of the bonds, shall be submitted to the qualified voters of the county, and shall be approved by a majority of those voting. The election shall be held at the usual places of voting. Thirty days' notice shall be given by advertisement in at least two newspapers published in the county, if there be any, at the court-house door, and at each of said election precincts. If there be no newspapers published in the county, then the advertisement shall be published in some newspaper having, in the opinion of the Commissioners, the widest circulation in the county. The advertisement shall contain a copy of this act, as well as the amount proposed to be subscribed by the Commissioners, and the amount of bonds or other evidences of debt proposed to be issued. Those approving the proposition shall deposit in the ballot box ballots with the printed or written word "Approved"; those disapproving the same shall deposit ballots with printed or written words "Not Approved"; and if a majority of said voters shall vote "Approved," they shall be deemed to ratify and approve the subscription and debt proposed to be made and the tax proposed to be levied.

SEC. 6. The Commissioners of any county proposing to subscribe for stock as aforesaid, shall have authority to take all measures consistent with this act, and the laws of the State, for registration of voters, holding the election and returns of the re-

sult of the same; and if said subscription be approved, they shall have power to take all measures proper for carrying the same into effect.

SEC. 7. The Chatham Railroad Company shall have power to receive subscriptions to its capital stock, payable in real or personal property at such valuation as may be agreed on between the company and the subscriber. It shall not be necessary for the wife to join her husband in the conveyance of any right-of-way or other interest in real estate of the husband, for any purpose to said company in order to pass her right of dower or other material right therein.

SEC. 8. The said company shall have power to take all such securities and mortgages of real and personal estate as it may deem proper to secure the faithful performance of contracts for the construction and repair of said road, and the buildings and other things incident thereto.

Ratified the 10th day of April, A. D. 1869.

EDWARDS & BROUGHTON, PRINTERS AND BINDERS, RALEIGH.

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Supreme Court of the United States.

OCTOBER TERM, 1902.

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No. 247.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY AND JOHN H. JOHNSON, SHERIFF AND EX OFFICIO TREASURER OF WILKES COUNTY,

vs.

W. N. COLER & COMPANY.

SUPPLEMENTAL BRIEF FOR PETITIONERS.

A. C. AVERY,
Counsel for Petitioners.

(18,411.)

Supreme Court of the United States.

OCTOBER TERM, 1902.

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THE BOARD OF COMMISSIONERS OF WILKES COUNTY AND JOHN H. JOHNSON, SHERIFF AND EX OFFICIO TREASURER OF WILKES COUNTY,

vs.

W. N. COLER & COMPANY.

SUPPLEMENTAL BRIEF FOR PETITIONERS.

THE QUESTION IS ONE OF POWER OR AUTHORITY.

The appellants contend that the bonds are invalid unless authority is given expressly or by necessary implication in the charter and amendments (all of which are set forth in former brief of appellants) or in the code sections 1996 to 2000.

1 Dillon on Munc. Corp. (4th ed.), secs. 542, 549, 553.

Justice Douglas, delivering the opinion of the court and discussing the question whether the charter and amend-

ments vested authority in Wilkes county in Call *vs.* Commissioners of Wilkes, 123 N. C., at page 313, said:

*First. We do not see that any authority whatever is given or attempted to be given by these sections to Wilkes county to subscribe to the capital stock of this company. * * * It is evident that the legislature as well as the railroad itself thought that the authority given in the ordinance was not sufficient, as in both cases additional legislation was sought and obtained.*"

THE QUESTION IS WHETHER JUSTICE DOUGLAS ERRED WHEN HE SAID THERE WAS NO AUTHORITY IN WILKES COUNTY OR WHETHER THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THE CHARTER (EXHIBIT A) AND THE ACT OF 1879 (PAGE 19 OF FORMER BRIEF) VESTED AUTHORITY IN THE COUNTY. (SEE OPINION, PRINTED RECORD, AT PAGE 116.)

The opinion rests upon the idea that the power was granted by the mere location of the line, by the act of February 20, 1879, and that, though the direct provision, that the county could subscribe (section 4 of the act), was void, the same end was accomplished in the enactment of section 1, defining the route, though passed in the same defective manner.

The circuit court of appeals erred when it rested its opinion that the first section of the act of 1879 was as valid as a grant of power as if it had been enacted as part of section 13 of the charter on March 9, 1868 (printed Record, pp. 116 and 117), because—

1st. That would be to presuppose that no authority existed on February 19, 1879, and that on the 20th of February the legislature attempted to supply that power, but

failed to do so by the use of direct terms in section 4, because of a violation of the express mandate of the Constitution, rendering section 4 void, though the same end was accomplished by section 1.

If that be true, any charter enacted before 1868, and containing authority in terms for any county through which it may pass to make subscriptions to its stock, can be amended by providing for new lines in every direction and empower every county in the State to subscribe, though the amendments should not be passed in conformity to the Constitution, article II, section 14.

This would defeat the *purpose of the framers of the constitution to have the vote of every legislator recorded in the journals* upon questions whether municipalities or counties should be empowered to create debts except for necessary expenses.

2d. If the effect of the enactment were to engraft section 1 of the act of 1879 on to section 13 of the charter, the line actually built is not the line provided for in the act of 1879, *in that it does not pass through Jonesville or Wilkesboro, the only points west of Salem-Winston, named in the act, and in that it was entirely north of the Yadkin river, while both of those points lie south, and in that the map shows it follows the valley of the Yadkin (called by counsel nature's line) for only a few miles before reaching a terminus at North Wilkesboro,* whereas the act required the line to be located "up the valley of the Yadkin before reaching Jonesville."

A leading case in point is Sherwood *vs.* Lafayette Co., 3 Dillon C. C. R., 236, where it was held *that an amendment to a charter providing for a line south of the Missouri river did not vest powers given to counties north of said river by the charter.*

It would seem to follow that a road constructed north of the Yadkin river could not have the privilege of using a subscription to a branch which by law was to be built so as to pass directly by two points, one about six and the other over one mile south of the river. (See digest of that case.)

1 Dillon (4th ed.), page 642.

3d. The constitution of North Carolina, article V, section 4, limited the power of the State legislature after April 22, 1868, when it went into effect, to subscribe to the capital stock of railroads except such as were unfinished when the constitution was adopted and those in which the State then had a direct pecuniary interest.

The Chatham railroad was chartered before April, 1868, and the State had a direct pecuniary interest in it. (See brief, already filed, pp. 66, 67 to 69, and 72, 73.) By amendments enacted August 3, 1868, and thereafter (see former brief, Exhibit D, pp. 73, 74, 75, 76 to 81) it was provided that a branch might be built from the graded terminus (see act of August 3, 1868, p. 73) to "the South Carolina State line near Cheraw." The supreme court of North Carolina held that the Cheraw branch was not a part of the original line, but *between the termini of the route established by previous legislation was a new road.*

Galloway *vs.* Chatham R. Co., 63 N. C., at p. 158.

See extract from opinion former brief, p. 59.

The act of February 20, 1879, amended section 13 of charter by adding the "and one of which (branches) shall be constructed from Winston-Salem * * * which branch shall be known as the Second division."

The act twice calls it a branch, whereas the act of February 3, 1869, makes provision for the construction "of" the Yadkin Valley division of said railroad, running from Salem-Winston by way of Lewisville, thence by way of Yadkinville, in the county of Yadkin, to the foot of the Blue Ridge, in the county of Caldwell.

This line is not called a branch, but a division, like that from Greensboro to Salem, and is spoken of only as a division.

A direct line run by Yadkinville to the foot of the Blue Ridge at Coffey's Gap, three miles north of the line of Burke county, would pass through north Iredell, Alexander, and Caldwell counties, and would terminate at the lowest gap of the Blue Ridge on the east and opposite to the head of Watauga river, down which to Tennessee is the only practicable line to the northwestern boundary of the State, in Watauga county, on the west side.

"*Nature's* line," directly west from Wilkesboro, is notoriously an impracticable one, and, as shown by experimental surveys of three companies, *would run against insurmountable precipices.*

THE BLUE RIDGE GEOGRAPHY.

Mt. Airy, the terminus of one branch, is near the foot of the Blue Ridge, which runs southwest. Wilkesboro is within fifteen miles of the Blue Ridge on the north, within thirty of Patterson, on the west, and Patterson is within five miles of the foot of Blue Ridge.

The only gap from Mt. Airy to the southern boundary of Caldwell, where grading has been done, is Coffey's Gap, three miles north of the Burke County line. This is matter of uni-

versal knowledge in North Carolina, appearing from legislation and judicial annals. These local matters are known to and considered by the State tribunal. A line from Winston-Salem to Coffey's Gap would not touch Wilkes county, but would pass through Iredell, Alexander, and Caldwell.

MISTAKE OF COUNSEL FOR APPELLEES.

Cotton Mills *vs.* Waxhaw does not sustain the contention of counsel that it is so far constitutional as indirectly to confer power, as appears from the following extract from the opinion:

"*We have repeatedly held that this section is mandatory and not directory, and that a failure to comply with its provisions is fatal to any statutory authority to levy a tax or create a debt* (Bank *vs.* Commissioners and Commissioners *vs.* Snuggs, *supra*; Thrift *vs.* Elizabeth City, 122 N. C., 31; 44 L. R. A., 427; City of Charlotte *vs.* Shepard, 122 N. C., 602; Mayo *vs.* Commissioners, 122 N. C., 5; 40 L. R. A., 163; Commissioners *vs.* Call, 123 N. C., 308; Commissioners *vs.* Payne, *ibid.*, 432; Commissioners *vs.* De Rosset, and Black *vs.* Commissioners, *supra*)."

Rodman Heath Cotton Mills *vs.* Waxhaw, 130 N. C., at pp. 294, 295.

Article II, section 14, is set forth in full in the opinion, and the foregoing extract applies it to the case of an act incorporating a town. It is held clearly that an act passed in accordance with article II, section 23, may create a municipal corporation, *but it cannot, either directly or indirectly, clothe the municipality with power to create a debt.*

The amendment of February 20, 1879, if it had been an original charter, would not have empowered the corporation

to create the debt. Under the decision of the court cited, it can confer no greater power as an amendment than would have been granted had it been an original charter.

THE WORD "NEAR."

The decisions of the supreme court of North Carolina (cited former brief, pages 46 and 47), *it is conceded, hold that the word "near" is too indefinite to extend a line to the object near which it is to go.* The appellants are at a loss to understand *how this established rule* which prevails in settling the boundary lines of tracts of lands *should be declared inapplicable to railroad lines,* if railroad companies have no more privileges than natural persons. Suppose a line were run (under the act of 1869) through North Iredell, Yadkin, and Caldwell counties to the foot of the Blue Ridge at Coffey's Gap, this would pass through two counties contiguous to, adjacent to, or bounded by Wilkes county, but none of these descriptive words are used. Would such a line be "near" to Ashe, Surry, or Watauga county, because only one county intervenes? If so, how many counties must intervene before the word "near" ceases to apply? In the language of the court, "how near" must a county be—in 50, 100, or 200 miles? Can this court define "near" as a description of location?

"TO BE DETERMINED" BY WHOM—THE LEGISLATURE OR THE COMPANY?

Before the constitution of 1868 was ratified, April 24, 1868, a charter was a contract between the State and a railroad company, because the power to amend charters was first reserved in that constitution. By reference to former briefs, pages 60 to 65, and the acts there referred to as exhibits, it will appear that the legislature and the company acted on that idea.

The right to determine the route was reserved in the first section of the charter, to be determined by the legislature, with the assent by ratification of the company.

See 120 N. C., pages 624, 625.

Former brief, 65.

The legislature thought it must be so determined, and hence passed act of February 3, 1869, and attempted to pass act of February 20, 1879.

The route by Lewisville, Yadkinville, and to valley of Yadkin would run by upper valley of Lewis Fork, the main prong of the Yadkin, to Coffey's Gap. That entire line runs south of the Yadkin river till it passes Yadkinville.

The charter fixed the location of the first division through Forsyth, but nothing except the void law of 1879 mentioned Wilkes as a county through which any branch even should pass.

Upon questions of geography and topography the Federal courts are bound by the decisions of the Supreme Court.

Justice Douglass, for a majority of the court, after all of these *local questions* had received due consideration and after conceding the right of Forsyth county, concludes for the court that it could find no grant of authority to Wilkes county. Was not that court better advised as to these questions?

THE ACT OF JANUARY 3, 1872 (PAGE 16 OF FORMER BRIEF).

Section 4 of this act repealed "*all parts of ordinances* and of acts of the General Assembly of North Carolina making appropriations, * * * and all parts of such ordinances as are inconsistent with this act are repealed." (See page 18 of former brief.)

Section 8 of the charter ordinance of March 9, 1868, provided for appropriations. If the contention of counsel that this act repealed the provisions of the act of February 3, 1869, locating the Yadkin Valley division can be sustained, *it would follow that section 1 of the charter would also be repealed, and all authority which it confers would be annulled.*

IF FURTHER LEGISLATION WAS NOT NECESSARY TO EXTEND THE ROAD WEST, THEN THE LEGISLATURE, THE RAILROAD COMPANY, ACTING THROUGH ITS ATTORNEYS, THE COUNTY AUTHORITIES, AND THE SUPREME COURT OF NORTH CAROLINA MISCONSTRUED THE CHARTER.

Are all these opinions on a local question to be overruled? In Belo *vs.* Com'rs it was decided that the charter empowered Forsyth to subscribe, and power of no other county was passed upon.

In Comm'rs *vs.* Call it was held *that no such power was given to Wilkes county.* The Federal courts ought to lean towards the correctness of this distinction.

This inclination should be stronger, in view of the universal idea that the charter applied only to counties therein named as evidenced by action of the legislature, the company, the bar, and the county. The recital of the act of 1879 worked no estoppel, but it is none the less evident that the company and the county were advised that the legislative idea that additional legislation was necessary to confer power was correct.

REFLECTIONS ON JUSTICE DOUGLASS.

The charge, made in the circuit court, that Justice Douglass, who delivered the opinion in Commissioners *vs.* Call, *supra*, was disqualified by interest, was unwarranted. (See agreement as to facts insisted on for appellees, pages 94 and 95 of Record.)

By reference to these pages of the record, it will appear that counsel insisted that it should appear as a fact, first, that Mrs. Douglass, wife of the justice, brought an action to restrain the Northwestern North Carolina Railroad Company from issuing mortgage bonds, and that afterwards "R. M. Douglass, the justice who delivered the opinion of the court, * * * on behalf of his wife as a stockholder, forbade the sale of the franchise of said company and opposed the decree confirming it."

This attack was not only unjust and unwarranted, but the attack could not have been intended or expected to do more than create prejudice against the case of appellants.

Williams *vs.* Eggleston, 170 U. S., 304.

FURTHER ATTACK ON JUSTICE DOUGLASS BY APPELLEES.

By reference to page 94 of printed Record it will appear that Justice Douglass was assailed in the circuit court, and facts were found which might be ground of attack in higher courts, because the clerk failed to correct the copy of his opinion in Commissioners *vs.* Call, sent up in record in Turner *vs.* Commissioners, 173 U. S. The language stricken out may have been intended to call attention to the fact that the valid act of February 3, 1869, required the line to run through Yadkin county, but the accidental failure to correct the copy is explained by affidavits of the clerk of the supreme court, of his assistant, and of counsel. (See pages 106 and 107 of Record.)

COLLUSION.

Counsel for appellants have not heretofore noticed intimations that there was collusion, because it has been held that this court will not consider such matters.

Adams Ex. Co. *vs.* Ohio State Auditor, 165 U. S., 194.

But as this matter has been lugged in to prejudice the cause of appellants, petitioners, if with any definite object in view, appellants wish to say, first, that the "unilateral" quotation from the dissenting opinion was something unusual, but the failure of Mr. Hackett to appear or file brief, as he had leave to do, is easily explained. He was physically unable to attend the court and failed to file his brief, because before it was finished the same questions were exhaustively argued by one of the foremost law firms in the State in Commissioners *vs.* Payne at the same term.

THE VALIDITY OF THESE BONDS WAS CONTESTED IN A CASE WHERE A BONDHOLDER AND THE COUNTY WERE PARTIES.

Turner *vs.* Commissioners, 173 U. S., 461.

The evidence in the record shows that Call, the original defendant, was in collusion with the bondholders, instead of acting as a trustee for both parties. (See affidavit of T. C. Jennings, page 87 of Record.)

It appears also of record that the board of commissioners, who went out of office December, 1898, refused to pay the costs of defendants (see affidavits, pages 88, 89 of Record), and that subsequently Call, as treasurer, paid the costs of Turner's appeal and persuaded the new board to reimburse him. He had been sued as treasurer and would have been entitled to claim reimbursement, under the law of North Carolina, had he tested the question, instead of accepting the volunteer services of an attorney, who was a bondholder and did not wish the case to be heard on appeal by the supreme court of North Carolina.

TURNER AND WELLBORNE AS BONDHOLDERS.

When Call refused to appeal, Turner and Wellborne, being two of the largest taxpayers of the county, determined to test the question whether they were bound to pay tax to liquidate the debt. They could better afford to lose their single bond than to pay their proportions of the special tax, as appellants understood their position.

The appellees here, complainants below charged on information that they did not own a bond. Turner swore that they did own it. (See Record, page 92.)

A. C. AVERY,

Of Counsel for Petitioners.

Office Supreme Court, U.S.
FILED
MAY 19 1902
JAMES H. MCKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 558.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY and JOHN H. JOHNSON, Sheriff and *ex officio* Treasurer of Wilkes County,

Petitioners,

vs.

W. N. COLER & COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION TO GRANTING WRIT.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
Of Counsel.

C. A. Nimmons, Walker and Gordon Street, N. Y.

27480

Supreme Court of the United States,

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JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
Of Counsel.

This case was once before this court on a certificate made by the judges of the United States Circuit Court of Appeals for the Fourth Circuit, propounding to this court certain questions for instructions to guide the

said judges in their disposition of this case. The decision of this case in answer to the said questions is reported in *Wilkes County v. Coler*, 180 U. S., 506.

A copy of the bonds in question is set forth in the Record (p. 16).

We do not think it necessary on this application for a writ of *certiorari* to do more than to refer to the able opinions of Judges MORRIS and BOYD in the United States Circuit Court of Appeals, printed in the Record, pp. 110, 118, respectively, and to reprint as a part of this brief the brief which we filed in the United States Circuit Court of Appeals on the final hearing of this case. It is shown in the above-mentioned opinions of Judges MORRIS and BOYD, and in our said brief, that the decision of the United States Circuit Court of Appeals, in favor of the validity of these bonds, is clearly correct.

There was double lawful legislative authority for the issuance of these bonds, namely, the ordinance adopted by the Constitutional Convention of North Carolina, March 9, 1868, as well as the separate and independent authority of Sections 1996 to 2000 of the Code of North Carolina, and the bonds were issued in conformity to the said ordinance, and were also issued in conformity to the said sections of the Code.

After the decision of this Court in *Wilkes County vs. Coler*, 180 U. S., 506, and after the case went back, the Circuit Court of Appeals rendered the opinions and entered the judgment which the petitioners for *certiorari* now seek to review. The Circuit Court of Appeals followed the decision of this Court, and found that the principles laid down by this Court required a judgment in favor of the validity of the bonds in question, and that Court puts its judgment solely upon the effect of the ordinance adopted by the

Constitutional Convention, March 9, 1868, which is so fully discussed by this Court, and, doing so, the Circuit Court of Appeals found it unnecessary to consider the other source of authority for the issue of these bonds, to wit, the Code, Sections 1996–2000. By referring to the questions certified to this Court, and which were answered in the case of *Wilkes County vs. Coler, supra*, it will be seen that one of the cases referred to in the first question certified to this Court was as to the duty of the United States Court to follow the decision of the Supreme Court of North Carolina in the case of *Wilkes County vs. Call*, 123 N. C., 108. This Court held that it was not the duty of the Circuit Court of Appeals to follow that case so far as the ordinance of 1868 of the Constitutional Convention was concerned, basing this conclusion upon the *Belo* case and the *Hill* case, which had been decided years before by the same Supreme Court of North Carolina in respect of this very ordinance of 1868.

In the application for *certiorari* the petitioners attempt to re-discuss and to have brought again into review the effect of the said ordinance of the Constitutional Convention, and the effect of the decision of the Supreme Court of North Carolina in the case of *Wilkes County against Call.* The leading argument made by the petitioners' counsel for the writ of *certiorari* is based upon the misconception that there is necessarily involved in this record a conflict between the Circuit Court of Appeals and the Supreme Court of North Carolina. Not so. If there is any conflict between the decision of the Supreme Court of North Carolina in *Wilkes County vs. Coler*, and the Federal Courts that conflict is not with the Circuit Court of Appeals, but with the Supreme Court of the United States, and with its decision in the case of *Wilkes County vs. Coler*,

180 U. S., 506. By referring to the opinion of Justice HARLAN in this last named case, as well as to the briefs on file in that case, it will be found that every question which is made in the petition for a *certiorari* in this respect is discussed, page after page, by counsel on both sides in the case which was after full argument decided in this Court, and we well recollect that it was discussed full four hours at the bar of the Court, and the questions have all been threshed out and solemnly decided. There ought to be an end of this litigation. There is nothing in the questions made by the counsel for the petitioners which should encourage the prolongation of this controversy. The county's case is without the slightest merit, in law or in morality.

These bonds were issued in the year 1889, in aid of the railroad into Wilkes county.

The railroad was constructed, and has been in operation ever since.

Interest was paid by the county upon these bonds for many years after their issuance, and the bonds are owned by *bona fide* holders who have paid full value therefor.

In 1898, years after these bonds had been issued and sold, the Supreme Court of North Carolina, in the case of *Commissioners of Wilkes County v. Call*, 123 N. C., 308, which was a simulated and collusive case, being brought by the Commissioners of Wilkes County against the treasurer of Wilkes county, rendered a decision by a bare majority, in which the county treasurer was enjoined from paying interest on these bonds. The record in the official report, 123 N. C., 308, states the counsel appearing as follows:

"Mr. *A. C. Avery* for plaintiffs; no counsel *contra*."

It is this decision of the North Carolina Supreme Court, in this one-sided case, with counsel only on one

side, and rendered by a bare majority of the court, which the learned counsel for the county,—the same learned counsel that appeared in the Supreme Court of North Carolina in that case,—now claims is binding as an authority upon the United States courts in this action brought by the bondholders for the interest on their bonds. The proposition is monstrous. The bondholders who now have brought this action in the United States courts were not represented in the Supreme Court of North Carolina, nor was any other bondholder represented there. No arguments were made on behalf of the bondholders there. It does not appear but that if bondholders had been present, and if counsel had represented them, and presented arguments to the court, that court would have decided precisely as did the United States Circuit Court of Appeals in the present case. Indeed, we think it is clear, and that this court also will see from the opinions of Judges MORRIS and BOYD, and from our brief herewith printed as a part of this brief, that upon the presentation of the case for the bondholders only one conclusion can possibly be reached, namely, that these bonds are valid and enforceable against the county of Wilkes.

The question presented on this application for a writ of *certiorari* is very short,—Is the decision of the Circuit Court of Appeals right? If it is, that ends the controversy, and without reference to the decision of the collusive and simulated case of *Commissioners of Wilkes County v. Call*, 123 N. C., 308.

We notice that the learned counsel for the county of Wilkes has seen fit in his petition for *certiorari* to make statements reflecting upon the character of Judge BOYD, one of the judges of the United States court which rendered the decision in the present case. We are not

here to defend Judge BOYD, and we do not believe that he needs any defense. Our associate, Mr. PRICE, prints in his brief a personal letter from Judge BOYD, denying the charges made against him by the learned counsel for Wilkes county. Judge BOYD sat in this case without any objection from the counsel for Wilkes county. Not only so, but no objection could possibly have been made to him, for he was not an attorney for either party, and had no more interest in the result of this litigation than have the judges of this Supreme Court. The charge against Judge BOYD, however, is not the question before this court. The question, and the only question, presented on this petition for writ of *certiorari*, is this,—Is the decision of the Circuit Court of Appeals correct? If it is, that ends the matter, and we submit that it is clearly correct.

For the convenience of the court we here print in an Appendix various provisions of the constitution of North Carolina, ordinance of Constitutional Convention, and statutes of North Carolina, which this Court may desire to refer to or examine in connection with this case, and give references to places in the record, where the statutes not here reprinted may be found printed in full.

As the decision of the United States Circuit Court of Appeals is clearly correct, the petition for writ of *certiorari* should be denied.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
Of Counsel for Respondents.

APPENDIX.

Provisions of Constitution, Ordinance of Constitutional Convention and Statutes of North Carolina, which this Court may desire to refer to in connection with this case.

1.

The following are provisions of the *Constitution* of North Carolina (see Code of North Carolina, 1883, Volume 2):

"ARTICLE II.

"LEGISLATIVE DEPARTMENT.

* * * * * *

SECTION 12. "The General Assembly shall not pass any private law, unless it shall be made to appear thirty days' notice of application to pass such a law shall have been given under such direction, and in such manner as shall be provided by law."

* * * * * *

SECTION 14. "No law shall be passed to raise money on the credit of the State or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each House of the General Assembly and passed three several readings, which readings shall have been on three different days and agreed to by each House respectively, and unless the yeas and nays on the second and third reading of the bill shall have been entered on the Journal."

* * * * * *

SECTION 16. "Each House shall keep a journal of its proceedings, which shall be printed and made public

immediately after the adjournment of the General Assembly."

* * * * * *

SECTION 21. "The style of the acts shall be: 'The General Assembly of North Carolina do enact.'"

* * * * * *

SECTION 23. "All bills and resolutions of a legislative nature shall be read three times in each House before they pass into laws, and shall be signed by the presiding officers of both Houses."

* * * * * *

"ARTICLE IV.

"JUDICIAL DEPARTMENT.

SECTION 19. "The laws of North Carolina, not repugnant to this constitution, or the constitution and laws of the United States, shall be in force until lawfully altered."

ARTICLE V.

REVENUE AND TAXATION.

SECTION 1. "The General Assembly shall levy a capitation tax on every male inhabitant of the State over twenty-one and under fifty years of age, which shall be equal on each to the tax on property valued at three hundred dollars in cash. The Commissioners of the several counties may exempt from capitation tax in special cases, on account of poverty and infirmity, and the State and county capitation tax combined shall never exceed two dollars on the head."

* * * * * *

SECTION 4. "Until the bonds of the State shall be at par, the General Assembly shall have no power to contract any new debt or pecuniary obligation in behalf of the State, except to supply a casual deficit, or for suppressing invasion or insurrection, unless it shall in the same bill levy a special tax to pay the interest annually. And the General Assembly shall have no power to give or lend the credit of the State in aid of any person, association or corporation, except to aid in the completion of such railroads as may be unfinished at the time of the adoption of this Con-

stitution, or in which the State has a direct pecuniary interest, unless the subject be submitted to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon."

* * * * * *

SECTION 6. "The taxes levied by the Commissioners of the several counties for county purposes, shall be levied in like manner with the State taxes, and shall never exceed the double of the State tax, except for a special purpose, and with the special approval of the General Assembly."

SECTION 7. "Every act of the General Assembly levying a tax, shall state the special object to which it is to be applied, and it shall be applied to no other purpose."

ARTICLE VII.

* * * * * *

SECTION 7. "No county, city, town or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein."

SECTION 12. "All charters, ordinances and provisions relating to municipal corporations shall remain in force until legally changed, unless inconsistent with the provisions of this constitution."

2.

Ordinance of Constitutional Convention, passed March 9, 1868 (**authorizing bonds in question**), printed in full in Record, page 10.

3.

Chapter 136, Laws of North Carolina, Session of 1852, Sections 33 to 37, inclusive (being the act referred to in Section 12 of the said ordinance of March 9, 1868), printed in full in Record, page 54.

4.

Act of August 11, 1868, printed in full in Record, page 13.

5.

Act of February 20, 1879, printed in full in Record, page 14.

6.

Act of March 2, 1881, printed in full in Record, page 17.

7.

Sections 1996–2000 of the Code of North Carolina of 1883 (**also authorizing bonds in question**) :

"SEC. 1996. The boards of commissioners of the several counties shall have power to subscribe stock to any railroad company or companies when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest.

SEC. 1997. The board of commissioners of any county proposing to take stock in any railroad company shall meet and agree upon the amount to be subscribed, and, if a majority of the board shall vote for the proposition, this shall be entered upon the record, which shall show the amount proposed to be subscribed, to what company, and whether in bonds, money or other property, and thereupon the board shall order an election, to be held on a notice of not less than thirty days, for the purpose of voting for or against the proposition to subscribe the amount of stock agreed on by the board of county commissioners. And, if a majority of the qualified voters of the county shall vote in favor of the proposition, the board of county commissioners, through their chairman, shall have power to subscribe the amount of stock proposed by them and submitted to the people, subject to all the rules, regulations and restrictions of other stockholders in such company or companies. Provided, that the counties, in the manner aforesaid, shall subscribe from time to time such

amounts, either in bonds or money, as they may think proper.

SEC. 1998. All elections ordered under the preceding section shall be held by the sheriff under the laws and regulations provided for the election of members of the General Assembly. The votes shall be compared by *the board of county commissioners*, who shall make a record of the same.

SEC. 1999. In case the *county* shall subscribe the amount proposed in bonds, *the board of commissioners shall have power* to fix the rate of interest, not to exceed the rate of eight per cent., when the interest on said bonds shall be payable, and at what place, and shall also fix the time and places of paying the interest, and shall also determine the mode and manner of the same; and also to raise by taxation, from year to year, the amount necessary to meet the interest on said bonds.

SEC. 2000. The taxes authorized by the three preceding sections to be raised for the payment of interest or principal shall be collected by the *sheriff in like manner as other State taxes*, and be paid into the hands of the county treasurer to be used by the chairman of the board of county commissioners as directed by this chapter."

It is admitted by all parties and all courts that these sections of the Code are constitutionally valid, and authorize the issue of bonds on the conditions therein prescribed.

Code sections 1996 to 2000 were originally the act of April 10, 1869, the title of which was, "An act to authorize the several counties of the State to take stock in railroad companies." Chapter 171, Public Laws, North Carolina, 1868–69. Ratified April 10, 1869. Public Laws, North Carolina, 1868–69, page 417. Re-enacted in Battle's Revisal, January 1, 1874; re-enacted in Code of North Carolina which went into effect November 1, 1883.

2748

United States Circuit Court of Appeals,

FOURTH CIRCUIT.

No. 319.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY ET AL.,
Appellants,
vs.
W. N. COLER & COMPANY,
Appellees.

Brief of Appellees on Final Hearing.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
CHARLES PRICE,
Of Counsel for Appellees.

C. G. Burgoyne, Walker and Centre Street, N. Y.

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United States Circuit Court of Appeals

FOURTH CIRCUIT.

No. 319.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY ET AL.,
Appellants,

vs.

W. N. COLER & COMPANY,
Appellees.

BRIEF OF APPELLEES ON FINAL HEARING.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
CHARLES PRICE,
Of Counsel.

This case stands for argument upon the whole record, including the answers by the Supreme Court of the United States to the certified questions.

The decision is reported in the 180th Volume, U. S. Reports, page 506.

The Court gave limited answers to the questions, in substance as follows :

1. That the Circuit Court should have regarded the decisions set out in the questions as controlling upon the inquiry, whether the legislative enactments of 1868,

1879 and 1881 were passed in such manner as to become, under the Constitution, laws of the State.

2. That the rights of the parties in this case are determinable by the law of the State, as it was declared by the State Court to be at the time the bonds here involved were made in the name of the County and put upon the market.

We have read carefully the opinion of the Supreme Court of the United States, delivered by Mr. Justice HARLAN, in *Wilkes County vs. Coler*, 180 U. S., 506. The Court answers the questions only to a certain extent, but not fully as certified, and is careful to state it (see p. 533). We understand that the opinion and the answers given to the questions reserve from their operation and effect the question whether the Convention ordinence of 1868 did not itself, aside from and independent of the legislation of 1868, 1879 and 1881, give full power and authority to Wilkes county to issue the bonds in question. The Supreme Court distinctly stated that the said ordinance of March 9, 1868, was valid, and was in force after the constitution was adopted, and that the Supreme Court of North Carolina had so held in the *Hill* and *Belo* cases. This settles the objection so much urged on the other side, based on certain decisions or dicta of the Supreme Court of North Carolina that all unexecuted powers were annulled by the constitution when it went into effect. Mr. Justice HARLAN expressly stated that the *Belo* case held that the said Ordinance of March 9, 1868, conferred the authority upon *Forsyth county* to make the subscription, and that this was so independently of the act of August, 1868, or of any other legislation (p. 529).

The Supreme Court says at page 529 :

" Forsyth County—whose liability on the bonds in suit in that case was directly involved—made the point

that it had no authority to issue such bonds. The court, however, held that such authority was conferred by the Convention ordinance of March 9, 1868, and the subscription and bonds made in the name of that county to the North Western North Carolina Railroad Company were upheld as valid *under that ordinance*, which was recognized as part of the law of the State and as conferring authority on the county of Forsyth to do what it did.

"It results that when the bonds here in question were issued in 1889, it was the law of North Carolina that the ordinance of 1868, constituting the charter of the North Western North Carolina Railroad Company, was not superseded by the constitution of 1868, but was *in force* and therefore gave power to counties *embraced by its provisions* to take stock in that company and pay for it in county bonds, just as Forsyth County had done."

As to *Wilkes county*, he states the question to be as follows, to wit (p. 529):

"Whether Wilkes county was so situated with reference to the contemplated road that it could be said to have had the same authority as was given to Forsyth county,"

which question he states "is not now decided." On page 532 he says:

"Was Wilkes county in the same category with Forsyth county?"

In short, if Wilkes county is in the same category with Forsyth county, then it stands decided by the Supreme Court of the United States that the said Ordinance of 1868 does, *per se*, give to Wilkes county the authority to issue the bonds in question, irrespective of the legislation of 1868, 1879 and 1881, so that the only question now is whether Wilkes county is in the same category with Forsyth county. If so, then the answer of the Supreme Court to the second question applies, which is that the rights of the parties in the Wilkes county case are determinable by the law of

the state as it was decided by the state court to be at the time when the Wilkes county bonds were put upon the market. It results, therefore, that, if Wilkes county is in the same category with Forsyth county, the question is conclusively decided in our favor by the late opinion of the Supreme Court of the United States, without anything more, and the Circuit Court of Appeals should affirm the judgment of the Circuit Court in the Wilkes county case.

There is no doubt that Wilkes county and Forsyth county are in the same category.

I.

The ordinance enacted by the Constitutional Convention of the State of North Carolina, March 9, 1868, entitled "An Ordinance to Incorporate the Northwestern North Carolina Railroad Company," gave, per se, clear and complete authority to the County of Wilkes to issue the bonds in question, and this proposition was twice expressly decided by the Supreme Court of North Carolina before the said bonds were issued.

The Constitutional Convention of the State of North Carolina enacted an ordinance to incorporate the Northwestern North Carolina Railroad Company, ratified March 9, 1868, printed in the record in this case, pages 12 to 15. This ordinance provided in section one:

"That, for the purpose of constructing a railroad of one or more tracks, from some point on the North

Carolina Railroad, between the town of Greensboro, in Guilford county, and the town of Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county, to some point in the northwestern boundary line of the State, to be hereafter determined, a company is hereby incorporated under the name and style of the Northwestern North Carolina Railroad Company, with a capital stock of two millions of dollars, which shall have a corporate existence as a body politic for the space of ninety-nine years," etc.

Section 2 of the said ordinance provided:

"Be it further ordained, That the capital stock of said company may be created by subscriptions on the part of individuals, corporations *and* COUNTIES, in shares of one hundred dollars."

Section 12 of the said ordinance provided:

"Be it further ordained, That the stockholders of said company may pay the stock subscribed by them either in money, labor or material for constructing said road, as the board of directors may determine, and that all *counties* or towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company, for the government of such towns and counties as are now allowed to subscribe to the capital stock of said company."

"The act incorporating the North Carolina and Atlantic Railroad Company," referred to in the said section 12 of the said ordinance, is the act, chapter 136, of the laws of North Carolina, session of 1852, sections 33 to 37 of which are printed in the record (pp. 66, 67), and said sections 33 to 37 are by such reference adopted and made part of said ordinance. These sections there quoted are the only material and pertinent sections of the said act of 1852, and are the only sections thereof which relate to county or municipal subscriptions.

Section 33 of the said act of 1852 provides :

"It shall be lawful for *any incorporated town or county, near or through which said railroad may pass*, to subscribe for such an amount of stock in said company as they shall be authorized to do by the inhabitants of said town or the citizens of said county, in manner and form as hereinafter provided" (Record, p. 31).

The language of section 2 of the ordinance above quoted is general—that "the capital stock of said company may be created by subscriptions on the part of individuals, corporations and *counties*." So also the language of section 12 of said ordinance is general —"*all* counties or towns subscribing stock." The said section 2 and the said section 12, if standing alone, would clearly include counties generally. The said section 33 of the act of 1852 provides that "it shall be lawful for *any incorporated town or county, near or through which said railroad may pass*." If this operates in any way to restrict the otherwise general language of the said sections 2 and 12 in the ordinance of 1868, it is, nevertheless, perfectly clear that the county of Wilkes is embraced within the language of said section 33.

A glance at the map of the state of North Carolina shows that a railroad constructed "from some point on the North Carolina Railroad between the town of Greensboro, in Guilford county, and the town of Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county, to some point on the northwestern boundary line of the state," must necessarily pass "near or through" Wilkes county.

The demonstration, therefore, is complete, that the said ordinance of the Constitutional Convention of

1868 expressly authorized the county of Wilkes to subscribe for stock in the said railroad company. It is also perfectly clear that the said county of Wilkes was authorized by the said ordinance of 1868, and by the said act of 1852, which was referred to in section 12 of said ordinance, to issue under the sanction of a popular vote, bonds of the county in payment of such subscription to said stock. Section 34 of the said act of 1852 provides that the justices of peace of the county may make an order for an election of the qualified voters of the county. Section 35 of said act of 1852 provides:

"That if, upon the return of such constable and of such sheriff, it shall appear that a majority of the qualified voters of such town, and by the return of the sheriff that a majority of the qualified voters of such county, voting upon the question, are in favor of the subscription, the corporate authorities of such town and the justices of such county shall appoint an agent to make the subscriptton in behalf of such town and county, to be *paid for in the bonds of such town and county*, and on such time as shall be agreed on by said town officers and the justices of such county" (Record, p. 32).

The language of section 12 of the said ordinance is "that all counties or towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company." The method of making the subscription, the method of paying such subscription—namely, in the bonds of such county—and all the other things in the said act of 1852 relating to the method of making the said subscription and paying the said subscription are, by this reference, incorporated into, and are a part of, the said ordinance of 1868. The method of paying said

subscription—namely, by the bonds of the county—is as much a part of the said ordinance as are the other provisions of the act of 1852 in regard to the making of the said subscription. It was so held, prior to the issue of the bonds now in suit, by the Supreme Court of North Carolina in the two *Forsyth County cases* of *Hill* and *Belo* below cited. No other method of paying the said subscription is provided for, either in the said ordinance or in the said act of 1852. Such a construction must be placed upon the ordinance and act as will render them effective and not nugatory.

The bonds in suit were duly authorized by a vote of the majority of the qualified voters of Wilkes County.

The said bonds now in controversy recite that they are

" authorized by a vote of a majority of the qualified voters of Wilkes county, by an election regularly held for that purpose on the sixth day of November, A. D. 1888, and by an order of the Board of Commissioners of Wilkes county [the said Board of Commissioners having conferred upon them, under the constitution of 1868 and the code of North Carolina, the same power which the justices of the peace formerly had] made on the first day of April, A. D. 1889. This series of bonds is issued to pay the subscription of $100,000 made to the capital stock of the Northwestern North Carolina Railroad Company by said county of Wilkes " (Record, p. 24).

The complaint in the present case alleges (Record, p. 7, paragraph 22) :

" That the county of Wilkes, acting through its Board of Comissioners, and in accordance with the ordinance and acts as above set out, subscribed the sum of $100,000 to the capital stock of the North western North Carolina Railroad Company, a proposi-

tion to subscribe the said amount having been submitted to the qualified voters of the county at an election held according to law, and a large majority of the said qualified voters having voted in favor of the same."

The answer of the county commissioners (Record, p. 32, paragraph 22) avers:

"These respondents, still denying the authority of the former commissioners to issue bonds or subscribe to the capital stock of the said company, admit that they did subscribe and issue bonds in the amounts alleged in the complaint, and that it was ascertained and declared that a majority of the qualified voters of Wilkes county had voted in favor of making such subscription, and that it is now too late to question said finding as to said vote."

The Railroad was actually constructed in Wilkes County.

It is also stated in the complaint (Record, p. 8, paragraph 23) that the said railroad was constructed in the said county of Wilkes, "and is the only one running within the limits of the county, and has been taxed by the county each and every year since its construction." The answer of the county commissioners (Record, p. 33, paragraph 23) also admits the completion of the said railroad to Wilkesboro, in the said county of Wilkes.

We have thus shown that even if this were an original proposition, which had never been passed upon by the Supreme Court of North Carolina, the said ordinance of 1868, standing by itself alone, was and is, *per se*, sufficient authority for the issue of these bonds of Wilkes county. It is not pretended or alleged by anybody that there is any act of the legislature repealing, or attempting to repeal, the said ordinance.

But we do not need to depend upon showing the correctness of this proposition as an original question. The point has been expressly adjudged by the Supreme Court of North Carolina in two cases, decided respectively in 1870 and 1877, known as the Hill and Belo cases, and these cases are conclusive in favor of the proposition that the said ordinance of 1868 gave, per se, lawful authority to issue these bonds, and the Supreme Court of the United States so holds (180 U. S., 506, *supra*).

Hill vs. Commissioners of Forsyth County, 67 N. C., 367 (June Term, 1870).

Belo vs. Commissioners of Forsyth County, 76 N. C., 489 (January Term, 1877).

The Original Ordinance authorized the railroad in Wilkes County in aid of which the bonds were voted, independently of the Act of February 20, 1879.

We understand the learned counsel for the appellants to argue that the particular railroad constructed in Wilkes county, in respect of which the bonds in question in the present case were issued, was a new branch line, and was not authorized until the passage of the act of February 20, 1879. In making this argument, however, the learned counsel is clearly mistaken in his facts. The language of Section 1 of said ordinance of March 9, 1868, printed in the record in this case, pages 62–66, is

" a railroad of one or more tracks from some point on the North Carolina Railroad, between the town of Greensboro, in Guilford county, and the town of Lex-

ington, in Davidson county, running by way of Salem and Winston, in Forsyth county, *to some point in the northwestern boundary line* of the state, to be hereafter determined, a company is hereby incorporated," etc.

Now, a glance at the map of the State of North Carolina shows that such a railroad to the "northwestern boundary line of the state" **must necessarily pass "near or through" Wilkes county.** The northwestern boundary line of the state is the line which is reached by going in a northwesterly direction "from some point on the North Carolina Railroad, between the town of Greensboro, in Guilford County, and the town of Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county." This is the **main line** of the railroad as contemplated by the said ordinance of March 9, 1868; and that railroad, in respect of which the bonds were issued in the present case, is a part of such main line of railroad. It is true that the said road has not been constructed, we believe, beyond the town of Wilkesboro, in Wilkes county, and that the point on the northwestern boundary line of the state has not yet been determined, as indeed it has not been necessary to determine it, because the railroad has not yet reached, or approached near to that boundary line, and the said ordinance did not prescribe any limit of time within which the said road should be constructed to the said northwestern boundary line.

When Section 1 of the said ordinance said the "*northwestern* boundary line of the state," it meant precisely what it said. It did not mean the *northern* boundary line of the state, to which the learned counsel for the appellants pointed in his oral argument in the United States Supreme Court. Not only is this obvious

from reading this express language of Section 1 of the ordinance, but it is also further obvious from the language of Section 13 of the said ordinance (Record, p. 66), as follows, to wit:

"Be it further ordained, That the company shall have power to construct branches of said road, one of which shall run from the towns of Winston and Salem by way of Mount Airy, in Surry county, to the line of the State of Virginia."

When, therefore, the Constitutional Convention meant the *northern* boundary line of the State, to wit, the line of the State of Virginia, it said so, and described the line as "the line of the State of Virginia," which is a wholly different thing from the *northwestern* boundary line of the state, mentioned in Section 1 of the said ordinance.

Furthermore, the topography of the country is such that the line of railroad described in Section 1 of the said ordinance, to wit, "a railroad of one or more tracks from some point on the North Carolina Railroad, between the town of Greensboro, in Guilford county, and the town of Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county, to some point in the northwestern boundary line of the state" must necessarily pass "*near or through*" *Wilkes County*. Such a road would naturally run up the valley of the Yadkin river through Wilkes county. This is the only natural and practicable route, and was the one intended and prescribed by the said ordinance of March 9, 1868. On either side of this Yadkin valley are high hills and mountains, and this Yadkin valley forms the natural and only proper route for a railroad from the points mentioned to the northwestern boundary line of the state. In view of these facts of physical geography, well known to the Constitutional Conven-

tion which enacted the ordinance, this Section 1 is in reality as specific as if the said Convention had prescribed in express terms that this road should go up the Yadkin valley through Wilkes county, mentioning that county by name.

But, in any view, the road must necessarily run "*near or through*" *Wilkes county*, and that is the material thing, and the only material thing.

But in order to hold that the said ordinance of March 9, 1868, authorized the construction of the railroad in Wilkes county, and the issue of the bonds in question in respect thereof, it is not necessary that the said line of railroad in Wilkes county shall be deemed a part of the main line of the said road. Section 13 of the said ordinance above quoted, provides :

"That the company shall have power to construct *branches of said road*, one of which shall run from the towns of Winston and Salem by way of Mount Airy, in Surrey county, to the line of the State of Virginia."

The road in question is not a branch which runs from Winston and Salem by way of Mount Airy, but that was only one of the branches which the said Section 13 authorized the said company to construct. It was also authorized by said Section 13 to construct other branches. Even if the said railroad in Wilkes county is to be regarded as a branch of said railroad (although, as we have shown above, it is to be regarded not as a branch, but as main line), yet these bonds now in question were properly authorized by the said ordinance to aid in the construction of such branch.

The railroad in question is not a "branch," but a part of the "main line" originally authorized by the Ordinance of the Constitutional Convention passed

March 9, 1868, but even if it were a "branch" the road was authorized and the bonds are valid.

It is argued by the learned counsel for the county, that the act of February 20, 1879, was the first authority for the construction of this railroad in Wilkes county, in aid of which the bonds in question were issued. The learned counsel says that the act of 1879 amends Section 13 of the original charter, by adding the words "and one of which [branches] shall be constructed from the town of Winston and Salem, up the Valley of the Yadkin, by way of Jonesville and Wilkesboro, in the county of Wilkes, to Patterson's factory in the county of Caldwell, which branch shall be known as second division." The learned counsel in one breath argues that this act of February 20, 1879, is invalid, because the ayes and noes do not appear on the House journal in the second reading, and in the next breath he argues that this railroad in Wilkes county is a *new* road, and was not authorized by the ordinance of March 9, 1868, because this act of 1879 speaks of this road as a branch. In regard to this argument it is to be remarked that there is no magic in the name "branch," and it is immaterial in the construction of the ordinance of March 9, 1868, whether the act of 1879, passed ten years afterwards, and by a different body of men, speaks of this road as a "branch." The real question is whether this railroad was authorized by the ordinance of March 9, 1868, whether it be called a "branch" or "main line." As to this fact there can be no possible question.

Even if this railroad constructed in Wilkes County is a branch, it was authorized by Section 13 of the original ordinance, although said Section 13 of the

original ordinance did not make it mandatory upon the railroad to construct the same, this *mandatory* provision being first inserted in the act of February 20, 1879, and even if this railroad in Wilkes County were to be called a "branch," it was, nevertheless, authorized by the said ordinance of March 9, 1868, and that ordinance authorized the issue of bonds to aid in the construction thereof.

The power to issue bonds was conferred upon any county "near or through which said railroad may pass." This power was given whether the said railroad was what is called "main line" or "branch."

The language of the act is "near or through which *said railroad* may pass"—that is, whether the said railroad be what may be called main line or branch, the power was expressly given by said Section 13 of the ordinance to construct branches—and even if this railroad into Wilkes county were to be regarded as a branch under the said ordinance of 1868 (clearly it should not be), still there was clear power for Wilkes county under the said ordinance to issue said bonds, for this was, in any view, a "railroad" of said company which passed "near or through" Wilkes county. On no theory can it be urged that what runs into Wilkes county is not "railroad," and railroad of the Northwestern North Carolina Railroad Company, and this railroad passes "near or through" Wilkes county, and, therefore, the said county of Wilkes was expressly authorized by the said ordinance to issue the bonds now in question, and this is so whether the said railroad be called a branch, under Section 13 of the said ordinance, or whether it be regarded as main line.

The learned counsel for the county seeks to argue

that because the act of February 20, 1879 (if the journals had shown that it was properly enacted by the legislature), undertook to authorize the construction of the railroad into Wilkes county and the issue of bonds by the county in aid thereof, therefore the said ordinance of 1868 had not authorized the said railroad nor the issue of bonds. A more complete *non sequitur* it would be hard to find. It frequently happens that out of abundant and extra caution a second act is passed, which undertakes to confer an authority which has already been given by a preceding enactment. The question whether or not such second enactment confers the authority is wholly immaterial as affecting the question whether the first enactment conferred the authority. Especially is this true when the second enactment was passed by a different body of men in the legislature, more than ten years after the original enactment. This second body of men obviously had no right or power or authority to determine in 1879 whether the ordinance of 1868 conferred the authority or not, and, as a practical matter, the act of 1879 was, of course, passed by the legislature without any definite or careful consideration of the question whether or not the authority already existed. A similar second authority was attempted to be conferred in the case of the bonds of Forsyth county, in question in the *Hill* and *Belo* cases, above cited, in respect of which the legislature passed a second act—namely, the act passed the 11th of August, 1868, which second act undertook to ratify and approve the issue of the said Forsyth county bonds. The Supreme Court of North Carolina, however, held that the original ordinance authorized the issue of the said bonds, and so, also, the Supreme Court of the United States in the present case states that the Supreme Court of North

Carolina thus held, and that this ordinance authorized the issue of the said bonds independently of the said second act of August 11, 1868.

The precise question is whether the ordinance of 1868 authorized the construction of a railroad by the Northwestern North Carolina Railroad Company " near or through " Wilkes county.

What may or may not have been authorized by the act of February 20, 1879, is wholly immaterial to this question, for, if the ordinance of 1868 authorized the construction of a railroad " near or through " Wilkes county, then the said ordinance also gave authority to Wilkes county to issue county bonds to aid in the construction of such railroad. The language of Section 1 of the ordinance is:

" A railroad of one or more tracks, from some point on the North Carolina Railroad, between the town of Greensboro, in Guilford county, and the town of Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county to some point in the northwestern boundary line of the state, to be hereafter determined," etc.

There can be no doubt whatever that a railroad running from the initial point on the North Carolina Railroad, by way of Salem and Winston, " to some point on the northwestern boundary line of the State," is such a railroad ; that is, is a railroad authorized by the said ordinance. This language of said Section 1, above quoted, of said ordinance, leaves to be determined only the " POINT *in the northwestern boundary line of the State.*" The learned counsel for the appellants attempts to argue as if the said ordinance had prescribed that the *route* of the said railroad should be hereafter determined. There is no such language in the said ordinance. The only thing that is to be hereafter determined is the " point in the northwestern

boundary line of the state" to which the said road shall run. That point has never yet been determined. The learned counsel for the county argues as if the said act of February 20, 1879, was an act which had been passed to determine something which was by said ordinance expressly required to be hereafter determined. The act of February 20, 1879, does no such thing. It does not determine the "point in the northwestern boundary line of the state" to which the said road shall run.

The words in the said Section 1, "to be hereafter determined," may mean either that the company is to determine such point or that the legislative body of the state is to determine it. It is immaterial for the purposes of this case by which one the determination is to be made. Suppose it means that the legislature of the state should designate a point in the northwestern boundary line of the state to which the road should run. Then the road already constructed through Wilkes county can be continued to such point as shall be so designated by the legislature. This road would then be a road exactly within the description of the said Section 1 of the said ordinance, for it would be a road from the initial point, "running by way of Salem and Winston, in Forsyth county, to some point in the northwestern boundary line of the state," to a point which had been determined by the legislative body—if the determination must be made by the legislative body. The intervening *route* between Salem and Winston, and the "point in the northwestern boundary line of the state" is not in any view required to be "hereafter" determined by the legislative body. Such *route* is left open to be determined by the company.

The learned counsel for the county, however, undertakes to argue as if the railroad company must wait

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until the "point in the northwestern boundary line of the state" has been determined by the legislature, or until a route has been determined, before the company proceeds to construct a railroad. In support of such argument he urges that some point in northwestern boundary line of the state might be designated by the legislature which would make the route through Wilkes county not the shortest route to such point in the northwestern boundary line of the state. This fact, however, that the route through Wilkes county might not in such an event be the shortest line is clearly immaterial.

But suppose that the argument of the learned counsel for the county be true, and that it is necessary for such road to go by way of the shortest route, still Wilkes county would be a county "*near or through*" which the said railroad *must* run. A glance at a map showing the geography of the country makes this conclusion inevitable. We respectfully ask the court to look at any standard and official map of the state of North Carolina, and of the region mentioned in the said ordinance, and we respectfully call the attention of this Court to the fact that whichever way a railroad may run "by way of Salem and Winston, in Forsyth county," to some "point in the northwestern boundary line of the state," such railroad *must run* "*near or through*" *Wilkes county*. The railroad company was, therefore, beyond any question, expressly authorized by the said ordinance of 1868 to construct the said railroad "near or through" Wilkes county, and the said county was by the said ordinance expressly authorized to issue the bonds now in question.

This attempted defense on the part of the county, however, that the route of this road was one which was not authorized by the said ordinance of 1868, is a

defense utterly unworthy of the people of the county. The purpose of the said ordinance clearly was to authorize the construction of a railroad from the initial point "by way of Salem and Winston, in Forsyth county, to some point in the northwestern boundary line of the state," and, furthermore, to authorize any county "near or through" which said railroad should run, *upon having a vote of the people of the county*, to issue bonds to aid in the construction of such railroad. The people of Wilkes county voted with practical unanimity to issue these bonds. They did it for the purpose of obtaining the railroad and the railroad facilities. The bonds were voted. The railroad company constructed the railroad. On these facts there is not only no legal merit, but no moral or equitable merit, in the county's attempting to raise any such frivolous defense.

The learned counsel for the county also mentions the fact that the ordinance of March 9, 1868, in Section 12 thereof, refers to the act incorporating the North Carolina and Atlantic Railroad Company, whereas the name of that company should be the Atlantic and North Carolina Railroad. This was obviously a mere clerical error. The company and the act intended were certain, as was held by the Supreme Court of North Carolina in the said *Belo case*, 76 N. C., 489, where the court expressly refers to Section 34 of the said act of 1852, which is printed in the record in this case, and mentions the same as being a part of the act referred to in the said Section 12 of the ordinance of March 9, 1868. This decision was rendered long before the bonds in question in the present case were issued, and is conclusive in the matter as respects the present bonds.

The learned counsel for the county also argues that the framers of the constitution of 1868 clearly intended to safeguard the interests of the counties by having the attention of legislators called sharply to any proposition to levy a tax upon counties represented by them. We would go even further and say that the framers of the constitution in 1868 clearly intended to safeguard the interests of the counties by requiring that the voters of the county should vote upon any proposition to levy a tax or incur a debt, except for necessary expenses. This was the means by which any undue taxation or undue incurring of debt was to be checked and regulated. The people of the county voted almost unanimously in favor of the issue of the bonds in the present case, and any attempt now by the learned counsel to argue that any great public policy announced in the constitution of 1868 has been disregarded is utterly without foundation.

Galloway case wholly inapplicable.

The learned counsel for the appellants cites the case of *Galloway vs. Chatham Railroad Company*, 63 N. C., 147 (1869). That case arose under Article V., Section 4, of the constitution of North Carolina, which is as follows:

SECTION 4. "Until the bonds of the State shall be at par, the General Assembly shall have no power to contract any new debt or pecuniary obligation in behalf of the State, except to supply a casual deficit, or for suppressing invasion or insurrection, unless it shall in the same bill levy a special tax to pay the interest annually. And the General Assembly shall have no power to give or lend the credit of the State in aid of any person, association or corporation, except to aid in the completion of such railroads as may be *unfinished at the time of the adoption of this Constitution*, or in which the State has *a direct pecuniary*

interest, unless the subject be submitted to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon."

* * * * * *

This section refers wholly to bonds issued by the *State*, and not at all to bonds issued by the counties, and its provisions are different from any provisions, either constitutional or statutory, relating to bonds issued by counties. The Court in that case held (p. 158),

" that the road provided for in the act of 18th December, 1868, is neither an unfinished road nor one in which the *State* had, at the adoption of the constitution [April 24, 1868], a direct pecuniary interest."

No such question arises under the constitutional provisions or legislation applicable to the Wilkes County bonds.

The question in the case of *Galloway vs. Chatham Railroad Company*, 63 N. C., 147, was whether, under Article V., Section 5 (now Section 4), of the constitution, the general assembly of North Carolina had the power to pass the act of December 18, 1868, eight months after the adoption of the constitution (April 24, 1868), authorizing **a new line of railroad,** and providing for the issue of state railroad aid bonds, **without submitting the question to a vote of the people of the State.** PEARSON, C. J., states the question involved and decided in the case as follows:

(p. 151): " Under Article V., Section 5, a question is made ' Has the General Assembly power to create this debt of two millions in aid of the Chatham Railroad Company unless the subject be submitted to a direct vote of the people ? ' "

The Constitution, Article V., Section 4, provided that no such State bonds could be issued

"except to aid in the completion of such railroads as may be *unfinished at the time of the adoption of this constitution*, or in which the State has a *direct pecuniary* interest, unless the subject be submitted to a direct vote of the people of the state and be approved by a majority of those who shall vote thereon."

The precise question, therefore, in this *Galloway case* was whether the road in question, first authorized December 18, 1868, eight months after the constitution was adopted, was an "*unfinished*" road "*at the time of the adoption of the constitution*" within the meaning of the said Section 4, and the Court held, of course, it was not. *No such question arises in the present case.*

The line of railroad into Wilkes County was clearly authorized by the original ordinance of the constitutional convention passed March 9, 1868, Sections 1 and 13, and was not like the line of railroad mentioned in the case of *Galloway vs. Railroad Company*, 63 N. C., 147, a new line of railroad.

The Supreme Court of the State of North Carolina distinctly declared in said *Hill* and *Belo cases* that the said ordinance of 1868 incorporating the Northwestern North Carolina Railroad Company was *per se* and without any legislative act sufficient authority for a county to subscribe to the capital stock of the Railroad Company and issue county bonds in payment therefor. The court distinctly puts its decision upon the ground that the "bonds were valid in the hands of *bona fide* holders without the aid of this healing act;" that is, under the ordinance of 1868, and without the aid of the act of August 11th, 1868. This is not any mere dictum of the court, but is the ground on which the court expressly rested its decision. Mr. Juctice HARLAN in

this very case (150 U.S., p. 529) has expressly so stated. It is true that the court also rested its decision upon the further ground that, "if any defects existed in the bonds," "the ratifying act of August 11, 1868, was a curative act and validated both the county subscription and the issue of the bonds." The court put its decision on both grounds, and not on either ground to the exclusion of the other. The language of the court as respects both of these grounds, therefore, amounts to a decision, and its language on either ground is not a mere dictum.

Furthermore, this decision in the Hill case made in 1870, and this decision in the Belo case made in 1877, construing this ordinance of the Constitutional Convention of 1868, was a construction upon which the purchasers of the bonds in question in the present case had a right to rely.

When the bonds in the present case were issued in 1889 these two decisions above quoted stood unreversed and unquestioned in the officially printed reports of the Supreme Court of North Carolina, construing the said ordinance. At the time of the issue of these bonds there was not a word or syllable in the said reports contrary to the said decisions. The said ordinance of the Constitutional Convention has not been in any wise changed either by constitution or by statute, from what it was when the above-quoted opinions of the Supreme Court of North Carolina, in the two Forsyth county cases, were rendered.

The provisions of the constitution of the State of North Carolina, mentioned in the said first question, certified by the Circuit Court of Appeals—namely, Article II., sections 14 and 16, and Article V., sections 1, 4, 6 and 7, and Article VII., section 7—were precisely

the same at the date of the rendering of the decisions in the two *Forsyth county cases* above cited as they were when the bonds in question in the present case were issued.

As stated above, the said ordinance of the Constitutional Convention of 1868 had not been repealed, nor had the legislature attempted to repeal it. Certain additional acts had been passed; but if on this branch of the argument it be conceded, merely for the sake of the argument, that all of those acts had fallen, because not properly enacted, nevertheless the said ordinance of the Constitutional Convention of 1868 stood when these bonds were issued, and stands to-day, precisely the same as it stood when the bonds were issued which were in question in the two Forsyth County cases above quoted.

This present case, therefore, is brought directly within the principles announced by the Supreme Court of the United States in numerous cases in which this Court has held that when a contract, and especially one which is evidenced by commercial paper, was valid under the constitution and statutes of a state, as then construed by the State Court, it will be held valid by the Supreme Court notwithstanding the fact that after such contract was made the state Court may, as in the case now at bar, have changed its decisions.

This proposition was certified to this Court in Answer No. 2 by the Supreme Court of the United States (p. 533).

Recital of the Act of February 20, 1879, in the bonds is immaterial.

It is immaterial that the bonds in question in the present case (Record, p. 19) re-

cited that they were issued by authority of the act of February 20th, 1879, which was an amendment of the Convention ordinance of 1868, and did not recite that they were issued under the ordinance itself, for it is well-settled law that if there was, in fact, legislative or legal authority for the issue of bonds, it is immaterial that the bonds recite another legislative act which did not give such authority.

A decision of this Court exactly in point is *Anderson County Commissioner vs. Beal*, 113 U. S., 227 (1885). In that case Mr. Justice BLATCHFORD, giving the opinion of this Court, says (p. 236):

"It is not disputed that the recital in the bond that it was issued under the act of February 25th, 1866, Sess. Laws of Kansas, 1866, ch. 24, page 72, was an error * * * (p. 237). It is very clear that there was legislative authority under the act of 1869 for the issuing of the bonds in question. There was an election, and the requisite majority of those who voted assented to the proposition for the subscription to the stock and the issue of the bonds, and the subscription was made by the proper officers, and they issued the bonds," etc. * * * (p. 238). "The bond recites the wrong act, but if that part of the recital be rejected there remains the statement that the bond 'is executed and issued' 'in pursuance to the vote of the electors of Anderson County of September 13th, 1869.' The act of 1869 provides that when the assent of a majority of those voting at the election is given to the subscription to the stock, the county commissioners shall make the subscription, and shall pay for it, and for the stock thereby agreed to be taken, by issuing to the company the bonds of the county."

This Court, therefore, held the bonds valid, notwithstanding they recited the wrong act.

In Dillon on "Municipal Corporations," Fourth Edition, section 523, note, it is stated:

"That bonds recite as authority for the issue a wrong act of the legislature does not necessarily invalidate them, if it can be shown that they were in fact issued under an act conferring the power" (citing *Anderson County Commissioners vs. Beal, supra*, and other cases).

See, also, to the same effect: *Knox County vs. Ninth National Bank*, 147 U. S., 91; and *Cairo vs. Zane*, 149 U. S., 122.

Furthermore, even if the rule were not as laid down in *Anderson vs. Beal, supra*, these bonds recite that they are issued by authority of an act of the General Assembly of North Carolina, ratified the 20th day of February, 1879, entitled "An Act to amend the charter of the Northwestern North Carolina Railroad," etc. The holder of these bonds is therefore notified of this act, but **on examining this act he will further see that this act is an amendment "of the ordinance of the convention of one thousand eight hundred and sixty-eight, ratified the ninth day of March, one thousand eight hundred and sixty-eight."** As said ordinance gave authority for the issue of these bonds, and as the holder of the bonds is thus, by reference to the act of February 20, 1879, referred to the said ordinance of March 9, 1868, which the said act of February 20, 1879, amends, there is no reason why a bondholder may not examine and refer to the said ordinance as authority for the issuance of the bonds in question.

In the case of *Anderson vs. Beal, supra*, the Supreme Court of the United States held that even if the bond recited a wrong act, it was competent to rely upon another act which really did give authority, although such other act was not recited. Much more is it competent in the present case, to refer to this ordinance

of March 9, 1868, as the bondholder did, by reference as above stated, have notice of the said ordinance by the recital in the bond and by an examination of the act of February 20, 1879, there recited.

The learned judge who gave the majority opinion in the case of *Commissioners of Wilkes Co. vs. Call*, 123 N. C., 308, 1898, cited the case of *Gilson vs. Dayton*, 123 U. S., 59, as holding that the recital of a wrong act is fatal to the validity of bonds. This case does not hold any such thing. On the contrary, the whole case is stated in the opinion United States Supreme Court, given by Mr. Chief Justice WAITE, the opinion being in full as follows—to wit (p. 61):

"The judgment in this case is affirmed on the authority of *Crowe vs. Oxford*, 119 U. S., 215. See also *Post vs. Supervisors*, 105 U. S., 667, 691. It appears on the face of the bonds sued for that the subscription was made under and by virtue of the act of February 18, 1857, and that the vote of the town was taken at a special town meeting called upon the 'application in writing of fifty legal voters of said town,' which is in accordance with the provisions of that act. The act of March 6, 1867, which the plaintiff now claims is sufficient to support the bonds, requires that the application for the town meeting shall be made by 'twenty voters and *tax-payers*.' The record does not show that any of those who signed the application for the meeting at which the vote was taken were taxpayers. It thus appears from the bonds themselves not only that they were issued under the act of 1857, but that they were not issued under that of 1867."

It thus appears that in the case of *Gilson vs. Dayton* the act which might, in fact, have given authority was not followed, as there was not any application of *taxpayers;* and, of course the bonds in that case were held invalid.

The late decision, 1898, by the State Supreme Court (123 N. C., 308) **overruling the Hill and Belo cases is intrinsically unsound and proceeds upon mistaken data.**

The Supreme Court of North Carolina, in the case of *Commissioners of Wilkes Co. vs. Call*, 123 N. C., 308, decided in 1898, by a bare majority, long after these bonds were issued, has undertaken to hold for the first time that the said ordinance of March 9, 1868, adopted by the constitutional convention of 1868 did not confer any power upon Wilkes county to subscribe for the stock of the railroad company and issue these bonds. In attempting to do this the court has undertaken to overrule the decisions in the *Hill case* and the *Belo case*, concerning the Forsyth county bonds, decided in 1870 and 1877, respectively, and above quoted. The court, in the *Call case*, by a bare majority, said that these two cases were distinguishable, but it gave no real reason for any distinction. In some respects the statements of the court in *Commissioners vs. Call* are obviously incorrect; for example, the court says (p. 318):

"Another important point of difference is that the Forsyth county bonds were voted and subscribed within a few months after the passage of the ordinance, before whatever power it may have given, if any, had expired by its own limitation."

It is impossible to conceive what the court meant by the ordinance of 1868 expiring "by its own limitation." There is no limitation in the ordinance which makes it expire. The *Hill and Belo cases*, above quoted, do, as we have already seen, expressly decide that the ordinance gave power to issue the bonds these in question.

Again, the Supreme Court of North Carolina, in the *Call case*, says :

(p. 321) " The ratification of the constitution on the 24th day of April, 1868, when it went into effect for all domestic purposes, annulled all special powers remaining unexecuted and not granted in strict accordance with its requirements. Article II., Section 14, is as follows : ' No law shall be passed to raise money on the credit of the State or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each House of the General Assembly, and passed three several readings, which readings shall have been on three different days, and agreed to by each House respectively, and unless the yeas and nays on the second and third reading of the bill shall have been entered on the Journal.' Article VII., Section 7, is as follows : ' No county, city, town or municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of a majority of the qualified voters therein.' "

This proposition of the court, and the sections of the constitution cited by it, do not at all affect the question of the continued existence of the said ordinance of the constitutional convention incorporating the Northwestern North Carolina Railroad Company, ratified March 9th, 1868. Article II., Section 14, of the constitution, quoted by the court, is as follows : " No law shall be passed," etc. This, by its very terms, and under all the authorities, is a direction to the legislature. " No law *shall* be passed," etc., obviously means shall hereafter be passed. This Section 14 occurs in Article II., which is devoted to directions to the legislative body, and it prescribes a rule of procedure for the future enactment of laws *by the legislature*. It does not either expressly or impliedly repeal or annul any

existing laws of the state. "It does not purport to take away any authority already granted. It only limits the power of the legislature in granting such authority for the time to come."

This question was before the Court in *County of Scotland vs. Thomas*, 94 U. S., 682. The decision of the Court on that point is stated as follows (p. 688):

"The clause of the Constitution on which the defendent relies is the fourteenth section of art. II., and is as follows: 'The general assembly shall not authorize any county, city, or town to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto.' This prohibition, it will be observed, is against the legislature's authorizing municipal subscriptions or aid to private corporations. It does not purport to take away any authority already granted. It only limits the power of the legislature in granting such authority for the time to come."

See, also, to the same effect:

County of Callaway vs. Foster, 93 U. S., 567.
County of Henry vs. Nicolay, 95 U. S., 619.
Louisiana vs. Taylor, 105 U. S., 454.
Macon County vs. Shores, 97 U. S., 272.
Howard County vs. Paddock, 110 U. S., 384.

See, also, other cases cited in "Dillon on Municipal Corporations," Fourth Edition, Section 542, Note.

The principle of these decisions is recognized by the Supreme Court of the United States in *Norton vs. Brownsville*, 129 U. S., 479, where that Court, Mr. Chief-Justice FULLER giving the opinion, after citing certain other cases which arose under provisions of a constitution which directly prohibited counties, cities, etc., from issuing railroad aid bonds, says (p. 490):

"These cases sufficiently illustrate the distinction between the operation of a *constitutional limitation*

upon the power of the legislature, and of a constitutional inhibition upon the municipality itself. *In the former case past legislative action is not necessarily affected*, while in the latter it is annulled."

Article VII., Section 7, of the constitution of North Carolina, is a "constitutional inhibition upon the municipality itself," but it only inhibits the issue of railroad aid bonds by a municipality "unless by a vote of a majority of the qualified voters therein." There was a vote of a majority of the qualified voters in the case of these Wilkes county bonds, and, therefore, this "constitutional inhibition upon the municipality itself" was not violated.

Ordinance of March 9, 1868, not repealed by the Constitution or any legislative act and was as to the power to issue bonds in full force in 1889 when the bonds in suit were issued.

Article II., Section 14, of the Constitution, does not either expressly or impliedly require the re-enactment of existing legislation, even statutory legislation, much less ordinance legislation enacted by the Convention that framed the Constitution. Not only so, but another part of the constitution, Article IV., Section 19, expresely provides:

"The laws of North Carolina, not repugnant to this constitution, or the constitution and laws of the United States, shall be in force until lawfully altered."

Also Article VII., Section 12, provides:

"All charters, ordinances and provisions relating to municipal corporations shall remain in force until legally changed, unless inconsistent with the provisions of this constitution."

There are no other repealing provisions in the Constitution of 1868. No attempt is made in the Constitution of 1868 to repeal the said ordinance of March 9, 1868.

[That a "county" is a "municipal corporation" within this Section 12 appears from the language of Section 7 of the same Article VII., which speaks of "county, city, town or other municipal corporation."]

This Article II., Section 14, does not provide any method of passage of laws *theretofore* enacted, and has no application to any laws previously passed.

Article VII., Section 7, however, does operate directly upon the county or other municipal corporation, and it does provide that such a county "shall not contract any debt," etc., "except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein." This section, however, does not expressly or impliedly repeal even any previously-existing statute. Much less does it repeal this ordinance of the Constitutional Convention. What this section does do is to operate directly upon the municipality and to provide that the municipality "shall not contract any debt," etc., "unless by a vote of a majority of the qualified voters therein." Such a vote was had in the present case, and this section of the constitution therefore, did not prohibit the issue of these bonds of Wilkes County.

Applying this language of Article VII., Section 7 of the constitution to the said ordinance of the constitutional convention, it is obvious that even if this ordinance were in the nature of a statute only, the ordinance would not be repealed, because the said ordinance, by referring to the act of 1852, Secs. 33–37, above quoted, expressly provides for the holding of an election by the qualified voters of the county to

vote upon the question of the issue of the bonds. The said ordinance, therefore, is not inconsistent with the said Article VII., Section 7, of the constitution, and was not repealed by it. We have already seen that the said ordinance was not repealed by Article II., Section 14, of the constitution.

Furthermore, the said Article II., Section 14, has no application to the said ordinance. The said ordinance is not a statute, and is, therefore, not within Article II., Section 14. This Section 14, is addressed to the legislature, and the words "no law shall be passed," etc., in the said Section 14 mean no law enacted by the legislature. The said ordinance was enacted by the constitutional convention, and the language of Article II., Section 14, is wholly inapplicable. For example, there were not two houses in the constitutional convention, and, therefore, the ordinance could not have been agreed to by *each house respectively*, etc., etc.

The Supreme Court of North Carolina, then, committed an obvious and plain error in holding, or attempting to hold, that either Article II., Section 14, or Article VII., Section 7, repealed, or undertook to repeal, the said ordinance adopted by the constitutional convention.

Moreover the said ordinance and Sections 33 to 37 of the Act of 1852, made part of it, fully comply with Sections 6 and 7 of Article V. of the Constitution, as fully appears from the "special" character of said Ordinance—even if said sections 6 and 7 can apply to said Ordinance.

The true nature and effect of the said ordinance incorporating the Northwestern North Carolina Railroad Company appears not to have been considered by the Supreme Court of North Carolina in the said *Call case*.

This is, perhaps, not surprising, as there was no brief and no counsel before the court in that case to present anything in opposition to the claim of the county commissioners that these bonds were invalid.

There in neither an EXPRESS nor IMPLIED REPEAL of the Ordinance of March 9, 1868, and the issue of the bonds in suit did not violate any provision of the Ordinance or of the Constitution.

There being no *express* repeal by the constitution of the ordinance of March 9, 1868 (which ordinance includes Sections 33, 34, 35, 36 and 37 of the charter of the North Carolina and Atlantic Railroad Company, being chapter 136 of the laws of North Carolina, 1852), at the very utmost the constitution would affect the said ordinance only so far as it was plainly inconsistent with it; that is to say, it would be a *repeal*, if at all, *by implication*. On the contrary, there being no conflict between the ordinance and the constitution, relating to the power to issue these bonds, the constitution itself, in express terms, recognizes and continues the ordinance in force, even if it be treated as an ordinary enactment, since Section 19, Article IV., of the constitution provides as follows:

"SECTION 19. The laws of North Carolina, not repugnant to this constitution or the constitution and laws of the United States, shall be in force until lawfully altered."

Now, if you lay the constitution adopted April 24, 1868, alongside the ordinance of March 9, 1868, no repeal or annulment of the power of counties, mentioned in the ordinance of March 9, 1868, to take stock or issue bonds will be found. On the contrary, the

scheme of the constitution and the scheme of the ordinance are the same. The ordinance authorizes counties on or near the line of the chartered railroad to subscribe for stock on a vote of a majority of the qualified voters of the county. The constitution, Article VII., Section 7, authorizes counties to become subscribers to the stock of railroad companies on "a vote of the majority of the qualified voters therein;" that is to say, both under the ordinance and constitution counties may be authorized to subscribe stock when sanctioned by a majority of the qualified voters of the county, and such a majority did sanction the issue of the bonds of Wilkes county in the present case.

It is alleged in the complaint (paragraph 22) as follows:

"That the county of Wilkes, acting through its board of commissioners, and in accordance with the ordinance and acts, as above set out, subscribed the sum of one hundred thousand dollars to the capital stock of the North Western North Carolina Railroad Company, the proporsition to subscribe the said amount having *been submitted to the qualified voters of the county at an election held according to law, and a large majority of the said qualified voters having voted in favor of the same.*"

This is admitted in the answer (paragraph 22) as follows:

"These respondents, still denying the authority of the former commissioners to issue bonds or subcribe to the capital stock of the said company, admit that they did subscribe and issue bonds in the amounts alleged in the complaint, and that *it was ascertained and declared that a majority of the qualified voters of Wilkes county had voted in favor of making such subscription, and that it is now too late to question said finding as to said vote.*"

Moreover, the bond recites that the said issue of bonds now in question was

"authorized by *a vote of a majority of the qualified voters of Wilkes county*, by an election regularly held for that purpose on the 6th day of November, A. D. 1888, and by an order of the board of commissioners of Wilkes county, made on the first day of April, A. D. 1889."

That this recital creates an estoppel as to the vote, even though the ordinance is not recited in the bond, see *Anderson County vs. Beal*, 113 U. S., 227, quoted, *supra*, on this brief.

So that in the present issue of bonds by Wilkes county there is no provision either of the ordinance of March 9, 1868, or of the constitution of the state, which was adopted April 24, 1868, repealing, annulling, or in any way impairing or affecting the power of Wilkes county to issue the bonds in question.

As elsewhere pointed out in this brief, Section 14 of Article II. has no application, because that refers in the language "No law shall be passed," etc., to laws which shall be hereafter passed, and, also, refers only to laws to be passed by the General Assembly, since it prescribes the method and manner of their passage by readings on three different days, and taking the ayes and the noes on the second and third readings in *each house*, and entering the same on the journal, &c., &c. These requirements in their terms and nature can have no reference or application to the ordinance of 1868, passed by the Constitutional Convention, which was *only one house*.

Ordinance of Constitutional Convention passed March 9, 1868, not inconsistent with Constitution. Section 7, Art. VII. of Constitution may be read as amending said Ordinance and Act of 1852, if necessary.

The said ordinance of March 9, 1868, was of the same dignity as the constitution, and was operative *per se* by its own force, and it could be maintained, if necessary, that no provision of the constitution of 1868 would operate to modify or repeal the said ordinance if there was any conflict between the two. But it is not necessary in the present case to maintain that proposition, for the constitution is not in any wise inconsistent with the said ordinance. Article VII., Section 7, of the constitution, which provides, in substance, that a county shall not contract any debt, etc., except for the necessary expenses thereof, unless by a vote of a majority of the qualified voters therein, might apply to, and operate directly upon, any county in the state, and thus, if necessary, be written in as an amendment to the said ordinance of March 9, 1868. That in such a case such a provision of the constitution operates to amend an existing charter passed by an act of the legislature is expressly held in the case of *East St. Louis vs. Amy*, 120 U. S., 600, and also in the case of *East St. Louis vs. People*, 124 Ill., 655.

In the case of *East St. Louis vs. Amy, supra*, the facts were as follows: In 1869 the legislature of Illinois had passed an act granting the city of East St. Louis power to issue $100,000 of bonds and to levy a tax of three mills for the payment thereof. In 1870 the new constitution of Illinois went into effect, which, in substance required that a municipal corporation issuing any bonds should, at or before the time of doing so, provide for the levy and collection of a

sufficient tax to pay the interest on such bonds, and to pay the principal within twenty years. This Court held that this provision of the constitution of Illinois of 1870 *did not repeal the said authority granted by the said act of 1869*, but that it amended it, and that *this amendment was, in effect, written into the charter*, so that the $100,000 of bonds were still authorized to be issued; but that, instead of the three mill tax levy provided in the charter for the payment thereof, a tax levy sufficient for the full payment of the interest and principal could be levied, as required by the constitution.

The Supreme Court of Illinois, in the case of *East St. Louis vs. People, supra*, decided the same question the same way, and cited with approval the opinion of the Court in *East St. Louis vs. Amy, supra*. See, also, to the same effect the case of *Neal vs. Delaware*, 103 U. S., 370, cited by this Court in *East St. Louis vs. Amy*, 120 U. S., 600, 603, *supra*, in which case it was held that the Fifteenth Amendment to the Constitution of the United States of itself, and without any action by the State, was written into the election law and into the jury law of the State of Deleware as an amendment thereof, and that *no new legislation* for this purpose was required by the State of Delaware, but that these election laws and the jury laws stood, and were in force, as thus amended by the Fifteenth Amendment to the Constitution of the United States.

The vote required by the Constitution of North Carolina, Art. VII., Sec. 7, was had for the bonds now in question.

A vote of the people of the County was required also by the said Ordinance of March 9, 1868, and sections

33-37 of said Act of 1852, referred to in section 12 said Ordinance. The vote which was had satisfied both said Art. VII., Sec. 7, of the Constitution, and the said Ordinance and said Act of 1852.

The learned counsel for the County repeats the error of Justice FURCHES, that in the *Hill* and *Belo cases* the subscription was made and the bonds were issued *before* the adoption of the constitution of 1868. It is difficult to understand why the learned counsel persists in repeating this obvious error and basing any argument thereon. The facts are stated and the dates specifically given by the Supreme Court of North Carolina in the *Hill case*, 67 N. C., 367, and again in the *Belo* case, 76 N. C., 489. It clearly and unquestionably appears there that the subscription was not made until the *June term, 1868*, after the constitution adopted April 24, 1868, went into effect; and the bonds were not issued until after August 11, 1868, for they recite an act of that date.

The learned counsel for the county apparently takes the curious position that in the *Hill case* and *Belo case* the Supreme Court of North Carolina made a "*grave mistake as to the very essence and nature of the authority relied on*," and that it is the duty of this Court now to correct the mistake made by the Supreme Court of North Carolina in these cases. The fact is, the Supreme Court of North Carolina, in the *Hill* and *Belo cases*, made no mistake, but correctly construed the said ordinance of March 9, 1868, as giving, *per se*, authority to issue bonds precisely like the bonds now in question; but even if the Supreme Court had made a mistake in the *Belo case*, that case would, under familiar principles, be conclusive in favor of the holders of the present bonds, since that case was decided long

before the present bonds were issued, and at the time of their issuance there was not any decision against their validity, nor any decision in any way modifying or overruling the said *Hill* and *Belo cases.*

The Supreme Court of North Carolina, in the Recent Case of Commissioners of Wilkes County vs. Call, is Clearly in Error in its Consideration and Statements of the Hill and Belo Cases.

The Supreme Court of North Carolina, in *Commissioners vs. Call*, 123 N. C., 308 (p. 317), 1898, undertakes to distinguish the case of *Belo vs. Commissioners*, 76 N. C., 289, by saying as follows:

"We have not overlooked the fact that in *Belo vs. Commissioners*, 76 N. C., 489, this court strongly intimates that Section 12 of the charter did confer the authority given in Section 33 of the act of 1852" [Section 2 of the ordinance of the constitutional convention gave the power, and Section 12 prescribed the manner of its exercise], "but it does so incidentally and with little discussion, because it was not denied in the pleadings. This was not the determining point in the case, which turned chiefly upon the recitals in the bonds and the ratifying act of 1868. This is clearly shown in the opinion itself, which devotes four pages to the discussion of equitable estoppel arising on the recitals, and about half a page to the possible binding effect of the ordinance, winding up with the significant sentence, on page 497, that 'as the case is presented to us, that question does not arise, and we do not decide it.' It evidently did not receive careful investigation, as it apparently did not arise on the pleadings. The court stated that the 'principle of equitable estoppel is a most important element in the transaction,' and that the recitals in the bonds (which were essentially different from those now before us) constituted an estoppel in *pais* upon the county of Forsyth."

It cannot be possible that it is necessary to remind this Court that there cannot be any estoppel by re-

citals where there was absolutely no legislative authority for the issue of bonds. The whole discussion of the Supreme Court of North Carolina in *Belo vs. Commissioners*, which, as stated by the court in the case of *Commissioners vs. Call*, occupied four pages, proceeded upon the only possible ground—namely, *that there was legislative authority* in the said Ordinance of 1868, but that perhaps that authority had not been strictly followed. The question which the court, on page 497, says "does not arise" is not what the Supreme Court of North Carolina, in the *Call case*, apparently means to give the impression that it is, but it is this question, stated in the very words of the opinion of the court in *Belo vs. Commissioners*, to wit :

"When the subscription was voted there is authority and reason for asserting that the Justices could have been compelled by process of law to make the subscription, unless in defense they could have shown that the election was not fairly conducted but was influenced by the fraud of the Railroad Company (*People v. Supervisors*, 27, Cal., 655). As the case is presented to us, that question does not arise and we do not decide it."

On the question of whether there was power to issue the bonds, the Court said, distinctly, in *Belo vs. Commissioners :*

"The county was clothed with the power to issue them, and it is admitted that a majority vote sanctioned the subscription of stock and the issue of the bonds."

Again, the Court said :

"It has been one purpose of this opinion to show that the bonds were valid in the hands of bona fide holders without the aid of this healing act" [that is, the act of August 11, 1868], the only other authority being the said ordinance.

In connection with this case of *Commissioners of Wilkes Co. vs. Call*, 123 N. C., 308, 1898, we desire to call the attention of this Court to what is obviously an error in the statement of facts in the dissenting opinion of Justice FURCHES. He says:

(p. 328) "On the 25th of March, 1868, the county of Forsyth subscribed $100,000 to said corporation [Northwestern North Carolina Railroad Company], which subscription was held to be valid in *Hill vs. Commissioners*, 67 N. C., 367."

The date, March 25, 1868, is obviously an error. This error has been quoted and repeated from time to time by the learned counsel in the present case. It appears from the statements of fact made by the Supreme Court of North Carolina, in the Case of *Hill vs. Commissioners*, not that the bonds of Forsyth County were issued on March 25, 1868, but that on March 25, 1868, the justices made an order to submit the question of subscription to the qualified voters of the county, the vote to be taken on April 4, 1868. It also appears that the returns of the election were made to the June Term, 1868, of the County Court and that the said Court, at the June Term, ordered the subscription to be made. It further appears from the official report of the case of *Belo vs. Commissioners of Forsyth County*, that, of the said bonds, some, at least, were not sold until March 5, 1869, and that these bonds recited that they were "authorized by an ordinance of 1868, by an order of the Court of Pleas and Quarter Sessions of Forsyth County, at June Term, 1868, and re-enacted and ratified and confirmed by an Act of the General Assembly, ratified the 11th day of August, 1868," so that the said bonds could not possibly have been issued before the 11th of August, 1858.

On this state of facts, the theory advanced by the Supreme Court of North Carolina, in the case of *Commissioners vs. Call*, 123 N. C., 308, 1898—namely, that these two Forsyth County cases of *Hill vs. Commissioners*, and *Belo vs. Commissioners*, could have decided that the ordinance of 1868 gave power to issue the Forsyth County bonds, and yet, that, consistently with these two cases, the North Carolina Court, in this later Wilkes County case, could decide that the constitution of 1868, which was ratified by the people April 24, 1868, had wholly repealed the said ordinance of 1868, and that this later decision did not, in effect, overrule the two Forsyth County cases—upon this state of facts, we say, that theory is absurd, and is completely refuted by the chronology. If the constitution which went into effect *April 24, 1868*, completely repealed the ordinance of 1868 incorporating the Northwestern North Carolina Railroad Company as to the power of counties to issue bonds, then the Court ought not to have decided in 1870 and 1877, in the two Forsyth County cases, that the said ordinance gave power to issue the Forsyth County bonds there in question, for those bonds were issued long after April 24, 1868, and bear on their face evidence that *they were issued after August 11, 1868*, for they recite the act of that date, as above stated.

Power of Counties given by the ordinance of March 9, 1868, had not expired by limitation in 1889, when the bonds in suit were issued.

The Supreme Court of North Carolina, in the case of *Commissioners vs. Call*, 123 N. C., 308, 1898, refer to the fact that the charter of the North Carolina and

Atlantic Railroad Company, or the Atlantic and North Carolina Railroad, Chapter 136 of the laws of 1852, provides, in Section 45, that "If the said road be not completed within six years after the ratification of this act, this charter shall be forfeited," and the court says: "Therefore, even if the powers granted in the act of 1852 had been given to the Northwestern North Carolina Railroad Company, or the counties in its interest, subject to the 'same restrictions,' those powers would have expired by their own limitation long before their attempted exercise twenty-three years thereafter." This language of the Supreme Court of North Carolina has no support in the ordinance of 1868 chartering the Northwestern North Carolina Railroad Company, nor in the parts of the act of 1852 referred to in the said ordinance. Section 12 of the said ordinance provides "that all counties or towns *subscribing stock* to said company *shall do so in the same manner and under the same rules, regulations and restrictions* as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company." This reference to the act of 1852 incorporating the North Carolina and Atlantic Railroad Company is made only so far as the said act of 1852 relates to the manner, rules, regulations and restrictions in *subscribing for stock*. It does not, by reference, make the act of 1852 a part of the said ordinance, with respect to the corporate life and existence of the company, and the six years' provision in Section 45 of the act of 1852 has no application to the Northwestern North Carolina Railroad Company.

Furthermore, this question of the corporate existence of the company is a matter which is expressly covered by other provisions of the said ordinance of 1868. Section 1 of the charter expressly provides

that the said company "shall have a corporate existence as a body politic *for the space of ninety-nine years*," and nowhere in the said ordinance is there any provision for any earlier termination of its charter, or for any forfeiture for not constructing this road.

Moreover, the said ordinance expressly provides for and contemplates the construction of the Northwestern North Carolina Railroad *by divisions*, and not necessarily all at one time, and there is no forfeiture prescribed for failure to construct any one division, nor is there any forfeiture prescribed if the railroad company, after having constructed one division of the road, waits for a time before constructing another division.

Thus Section 5 of said ordinance provides that the said company shall proceed to construct said road, with one or more tracks, as speedily as practicable, in sections of five miles each, to the towns of Winston and Salem, in Forsyth county, which portion of said railroad when completed shall constitute its first division. Here, then, is a provision that the said railroad shall be constructed "as speedily as practicable, in sections of five miles each, to the towns of Winston and Salem," and that this portion of the railroad when completed shall constitute its "*first division.*" No express provision is made in the act as to when any other division of the road is to be completed. Even this division to Winston and Salem is to be completed only "*as speedily as practicable*," and no forfeiture is provided even if this provision is not complied with.

It appears from the two Forsyth county cases *(Hill* and *Belo Cases)* that immediately upon its incorporation, in 1868, the railroad company began to obtain funds with which to construct its railroad to the towns of Winston and Salem, in Forsyth county. This

division of the railroad was constructed. Suppose that it had happened afterwards that no further railroad had been constructed. Said ordinance is wholly silent as to any forfeiture of the charter for not constructing additional railroad. If the ordinance had intended to provide for any such forfeiture, doubtless it would have provided what was to be done with the railroad already constructed, whether that railroad was to be operated by the Northwestern North Carolina Railroad Company, or whether it was to pass into the ownership of some other company.

The true view and the only view to be taken of this said ordinance on the point now under consideration, is that the Northwestern North Carolina Railroad Company might construct its road by sections or divisions from time to time, and that there was no forfeiture prescribed for any failure to complete the road to the terminus designated by Section 1, on the northwestern boundary line of the state of North Carolina.

In addition to the foregoing views, it is to be observed that if the Northwestern North Carolina Railroad Company was liable to have its charter forfeited for not exercising its franchise and constructing its railroad to its whole extent, *this was a matter solely between the state and the railroad company*, and to be taken advantage of only be *quo warranto* proceedings. There is no suggestion in the record that any such proceedings have been had or attempted. So long as the state permitted the road to exercise the franchises and powers conferred by the said ordinance, and failed to exercise any right of forfeiture, if any existed, it is not open to any county which, under the powers given by the said ordinance, had subscribed stock and issued bonds in aid of the construction of the said railroad, to say that the said charter was liable to be forfeited,

and, therefore, the county bonds were invalid. This is a matter with which the county has no concern. Especially has the county no concern in this matter, where the admitted fact is, as in the present case, that the railroad actually was constructed in the county of Wilkes and the county obtained all the consideration which was contemplated for the issue of these bonds.

The authority to issue bonds is not only a power conferred upon the County or municipality, but a privilege of the Railroad Company.

On pages 12 and 15 of the record are sections 12 and 13 of the charter, which give *this corporation* " power to construct branches of " the road, and conferred the authority and power given in Sections 33 and 34 of the Act of 1852, which are as follows :

" Chapter 136 of the Laws of North Carolina, Session 1852.

" SEC. 33. Be it further enacted, That it shall be lawful for any incorporated town or county near or through which said railroad may pass to subscribe for such an amount of stock in said company as they shall be authorized to do by the inhabitants of said town or the citizens of said county, in manner and form as hereinafter provided.

" SEC. 34. Be it further enacted, That the corporate authorities of such town, of the justices of the peace of such county, a majority of the justices of the county concurring, to make an order requiring the constable of such town and the sheriff of such county, at such time and on such notice as they shall direct, to open a poll and take the sense of the voters of such town qualified to vote for town officers, and of the voters of such county qualified to vote for members of the house of commons of the General Assembly, whether the officers of said town and the justices of the peace of said county shall subscribe to the stock of such company for such sum as the order shall propose, and the constable shall make return of the number against it, and the sheriff shall, in like manner, make return as to the vote in his county to the first court thereafter, to be held for such county and it shall be the duty of the sheriff to notify each justice of said county to attend

at the court-house, to which he may make his returns of said poll."

In the case of the County of *Scotland vs. Thomas*, 94 U. S. Reports, on page 689, Justice BRADLEY says:

"The specific question in the present case, therefore, is, whether the authority given the counties and towns in 1847, to subscribe to the capital stock of the Alexandria and Bloomfield R. R. Co., has become extinguished by the subsequent consolidation of that company with other companies, irrespective of the Constitutional provisions referred to."

Justice BRADLEY says, also, on page 688, after quoting the words of the Constitution of Missouri, similar to the words of the North Carolina Constitution of 1868, that "This prohibition, it will be observed, is against the Legislature's authorizing municipal subscriptions or aid to private corporations; *it does not purport to take away any authority already granted.*"

On page 693 Justice BRADLEY goes on to say: "But the case has other aspects, which it is necessary to take into consideration.

* * * * * *

"The project of the railroad promised a great public improvement, conducive to the interest of Alexandria and the counties through which it would pass." "The power was sought at the hands of the Legislature, and was given." "It was relied on by those who subscribed their private funds to the enterprise."

Speaking of this power, he says: "Why it should not still attach to this portion of the road as one of the rights and privileges belonging to it, into whose hands soever it comes, by consolidation or *otherwise*, it is difficult to see. * * * Subscription to the stock *was not only a power of the county, but a privilege of the company.*"

This is the view taken of this question by BYNUM, Justice, in *Belo vs. Commissioners*, and FURCHES, Justice, in his dissenting opinion in *Commissioners vs. Call.*

These powers are not only conferred upon the Counties, but are privileges of the company, the North

Western North Carolina Railroad Corporation. It follows, therefore, that Wilkes County was in "the same category" with Forsyth County.

The route of the road was determined by both the Legislature and the corporation. This was one of the privileges conferred upon the company, as said by Justice BRADLEY, in the case cited above, the *Thomas case*. And, besides, it is not for the County of Wilkes, which participated in the determination of the route, to be heard to say, in a suit by an innocent bondholder, years after it was determined, that there was no power to do it.

We do not understand that the Act of 1879, referred to by Justice HARLAN, to have been adjudged, for all purposes, null and void by the Supreme Court of North Carolina. Section 4 of the Act was adjudged void, but not Section 1. In the case of *Bank vs. Commissioners*, 11 N. C. Reports, 214, the Act is expressly declared valid as a railroad charter, because the certification cannot be impeached by the journals, but, void as a taxing act, because, for that purpose, under the Constitution, it can be impeached by the same journals.

It is well settled, *in all courts*, that an act can be unconstitutional in part, and constitutional in other respects. So, Section 1 of the Act of 1879 is valid, because, passed, in all respects, and certified, as required by the Constitution. See Act of 1879, and especially Section 5, &c., &c., where, upon its face, it is shown to *have been read three times and ratified*. The case of *Bank vs. Commissioners*, 119 N. C. Reports, 214, is decisive of this, being directly in point, and, indeed, is the case out of which all this litigation has sprung. And, further, if the route was not a proper one, it was acquiesced in by the County when

the Company could have been forced by mandamus to have selected the proper one; or it could have been enjoined, anyhow, from constructing the road on the route determined upon.

II.

There was lawful authority for the issue of these bonds in the present case UNDER THE CODE, **sections 1996 to 2000. These sections of the Code were originally adopted as the act of April 10, 1869. They were afterwards adopted as sections 1996 to 2000 of the Code of North Carolina of 1883. It is admitted by all that these sections of the Code, 1996 to 2000, were adopted in accordance with the constitution as respects the three several readings and the entry of yeas and nays upon the journal, etc.**

The Supreme Court of the United States was careful in answering the first question to say that the Federal court should follow the decisions of the state Supreme Court as controlling upon the inquiry whether legislative enactments of 1868, 1879 and 1881 were passed in such manner as to become, under the constitution, laws of the state, and thus the Supreme Court limited the effect of these decisions of the state Supreme Court to the point whether they had become laws of the state under Article II., Section 14, of the constitution. The Supreme Court of the United States, by thus carefully limiting its answer to the first question, has, in

effect, stated that these decisions of the Supreme Court of the State of North Carolina, with regard to the sections of the Code, are not to be controlling in the Federal courts, and hence the general rule applies, that the Federal courts should either follow the decisions which were in existence when the bonds were issued, if there were any, or, if not, then they should consider the questions for themselves, and they are not controlled by any subsequent decisions of the state Supreme Court. Hence, decisions of the Supreme Court of North Carolina, construing the Code made *after* the bonds in question were issued, do not bind the Federal courts, if such subsequent decisions of the Supreme Court of North Carolina are not in accordance with the general principles of jurisprudence, but the Federal courts may and should, exercise their own independent judgment. There is a long line of decisions to that effect in the Supreme Court of the United States, and these decisions relating to the construction of statutes are expressly recognized and distinguished by the Supreme Court of the United States in its opinion.

It will be noticed that on page 519 the Supreme Court says, referring to the acts of 1868, 1879 and 1881, as follows :

> " Observe that the issue is not as to the construction, meaning or scope of a statute, but whether that which purports to be a legislative enactment ever became a law for any purpose."

Under this decision of the Supreme Court of the United States, the Circuit Court of Appeals will, of course, no longer feel bound by the decisions of the Supreme Court of North Carolina construing the Code *after* the bonds were issued.

OUR FIRST PROPOSITION *under these sections of the Code is that they are prospective in their operation, and that they are not limited to any railroad which had been begun either before the constitution of 1868 was adopted or before the adoption of these sections of the Code by the act of April 10, 1869.*

The language of section 1996 of the Code is: "The Board of Commissioners," etc., "*shall have* power to subscribe stock," etc., "to aid in the completion of any railroad in which the citizens of the county *may have* an interest." *All this is future.* It applies to any railroad in which the citizens of the county may have an interest, either when the act was adopted *or at any time afterwards.* There is nothing in this language which restricts the operation of the act either to the time of the adoption of the constitution of 1868 or to April 10, 1869, the time of the first enactment of the statute which became these provisions of the Code. Any of the recent decisions of the Supreme Court of North Carolina to the contrary are wholly indefensible, and have no support in the language of these sections of the code. Inasmuch as all of these decisions were rendered after these bonds were issued, they are not binding upon the federal courts (See *Folsom vs. Ninety-Six*, 159 U. S., 61, *supra*).

These sections of the Code required an election and a vote of the majority of the qualified voters of the county in favor of the proposition of subscribing the stock and issuing the bonds. This provision was complied with in the case of this present issue of bonds. The bond recites it. The complaint (paragraph 22) alleges compliance, and the answer of the country commissioners (paragraph 24) also admits compliance with this provision of the code.

The recital in the bond is that the bond is "authorized by a vote of the majority of the qualified voters of Wilkes county by an election regularly held for that purpose, on the 6th day of November, A. D. 1888." We are aware of the fact that the said bonds recite that they are issued by authority of the act of February 20, 1879. But the recital of the act (if that act of February 20, 1879, be held not to give authority) would not invalidate the bonds, if they were, in fact, authorized by some other act, as sections 1996 to 2000 of the Code, now under consideration. See *Anderson County vs. Beal*, 113 U. S., 227, where the wrong act was recited. In that case, notwithstanding the bonds recite the wrong act, the Court held, as respects the recital of the election, as follows, to wit (p. 239) :

> " In view of all this, the statement by the commissioners in the bond that it is issued ' in pursuance to the vote of the electors of Anderson county of September 13, 1869,' is equivalent to a statement that ' the vote ' was a vote lawful and regular in form, and such as the law then in force required in respect to prior notice."

This recital, therefore, of the election in this Wilkes county bond is a recital of an election under sections 1996 to 2000 of the Code, and is conclusive in favor of the *bona fide* holders of these bonds, as was held in the said case of *Anderson County vs. Beal, supra.*

Sections 1996 to 2000 of the Code do not violate Article 5, Sections 6 and 7, of the Constitution as to "Special purpose," "Special object" or "Special approval" of the General Assembly.

Said Section 6 and 7, Article 5, of the Constitution are as follows :

SECTION 6. "The taxes levied by the Commissioners of the several counties for county purposes, shall be levied in like manner with the State taxes, and shall never exceed the double of the State tax, except for a special purpose, and with the special approval of the General Assembly."

SECTION 7. "Every act of the General Assembly levying a tax, shall state the special object to which it is to be applied, and it shall be applied to no other purpose."

It was objected by the state court in the case of *Commissioner vs. Call, supra*, and in *Commissioners of Stanley County vs. Snuggs*, 121 N. C., 394, 400, 401, cited in the *Call Case*, p. 323, that these provisions of the Code are a general act, and as such violate Article V., Section 6 and 7, of the constitution, which provides, in substance that taxes levied by the commissioners of the several counties for county purposes shall be levied in like manner as the state tax, and shall never exceed the double of the state taxes, except for a special purpose, and with the special approval of the General Assembly, stating the special object to which the tax shall be applied.

(a) **In the present case, however, there is not a word or a syllable in this record to show that the county tax necessary for**

these bonds would exceed double the state tax; therefore, the question does not arise.

(b) **If, however, it had been shown in the record in this case that the county tax for these bonds might exceed double the state tax, then these bonds are, nevertheless, valid:**

First, because the Code does not violate the provisions of Article V., Section 6 and 7, above referred to. The constitution only requires that the legislature give special approval to the special purpose for which any tax is levied in excess of the rate named, but such special approval may be given to all the counties, as well as to any one county, the object of the provision of the constitution being to require the special assent of the legislature to the special purpose. If the rate referred to in Article V., Section 6, is to exceed the double of the state tax, this section requires the legislature to specify the special purpose for which it may so exceed the state tax. The legislature could not authorize such excess by an act, general or special, which only named county purposes generally, and did not specify the special or particular purpose, but it is not necessary that the legislature should in each instance specify by name any particular county or counties. The specification required is only a specification for a special purpose. Legislative authority to subscribe for the stock in a railroad company and issue bonds in payment of such subscription is a special purpose within the meaning of this section, and so the sections of the Code, 1996 to 2000, being the act of April 10, 1869, do specify the special purpose for which the tax is to be levied. It is not necessary to name by name each particular

county. If these sections of the code had provided that the county commissioners of the county, A, B, C, D, etc., naming all the counties in the State, should have power to subscribe for stock in any railroad company, etc., obviously this would be good, for the very Section 6, Article V., of the constitution referred to, contemplates that such taxes may be levied by all "the several counties" of the state. The constitution does not say that any special act is required, but only requires that the purpose be specified, and that the tax and the purpose have the special approval of the General Assembly.

The propositions of the Supreme Court of North Carolina on this point seems to be, in effect, that if the legislature passes a special act for each county in the state; that is to say, ninety-five acts, each act exactly alike, except that one act applies to one county and another to another, and so on through all the ninety-five acts, the legislation is good; but if the legislature, instead of doing this, enacts precisely the same act and says that this act shall apply to all counties in the state, then such an act is bad. Such a view is, of course, unsound, and, if that be the view of the state Supreme Court, the federal courts cannot be expected to follow it as to negotiable bonds issued before such state decision was made.

AND, SECOND, *however this point may be decided, a ruling one way or the other would not invalidate these bonds. A bond may be a valid obligation, although there is not sufficient tax to pay it.*

Such bonds could be paid by as much tax as could be levied, and, if at any time the legislature did pass a special act giving its special approval to the levy of a further tax, then the defect of a lack of power to tax would be removed, if such defect existed. Therefore,

on this point, the objection raised by the Supreme Court of North Carolina must fall. That there may be bonds which are valid, although there is a tax-rate limit, is well settled. See *United States vs. Macon County*, 99 U. S., 582. Article V., Section 6 of the constitution of North Carolina is a mere limitation upon the tax rate, such as was involved in this case of *United States vs. Macon County*, just cited.

FURTHERMORE, THIRD, *even if there be this tax-rate limit in Article V., Section 6 of the constitution of North Carolina, that is a mere limit. It does not appear as a matter of law on the face of the constitution, or on the face of these sections of the code, or on the face of these bonds, that in the instance of these particular bonds of Wilkes county the tax-rate limit would be exceeded. Whether or not this tax-rate limit would, as a fact, be exceeded, is a matter in pais, of which the holder of a negotiable bond, like the bonds in question in the present case, is not bound to take notice.* Moreover, as above stated, there is no proof in the present case that the county tax for these bonds would exceed double the state tax.

Erroneous Construction of the Word "COMPLETION" in Section 1996 of the Code, by the Supreme Court of North Carolina in its Late Decision in the *Stanly County Case*, 121 N. C., 394, 1899.

The Supreme Court of North Carolina, at this late day, in *Commissioners of Stanly County vs. Snuggs*, 121 N. C., 394, has taken a very narrow view of the word "completion." It has undertaken to say that these sections of the Code refer only to a railroad which had been begun, and that the word "completion" is not

synonymous with "construction," but that the language here requires that there must have been an unfinished road.

The court went further, and held that there must have been a road unfinished *at the time of the adoption of the constitution*, April 24, 1868, in order that these sections of the code might have application. This interpretation of the word "completion," we submit, is not the correct one.

It seems obvious that it is used as synonymous with the word "construction." This view is, we think, supported by the obvious difference between this language and the language used in the state constitution as respects the issue of state railroad aid bonds. Article V., Section 4, of the constitution prohibits the issue of State railroad aid bonds, "except to aid in the completion of such railroads as may be *unfinished at the time of the adoption of this constitution.*" Section 1996 of the Code, adopted April 10, 1869, about one year after the framing of this provision of the state constitution, omits the significant words—namely, "unfinished at the time of the adoption of this constitution." On no possible theory can these words be read into the statute. The legislature did not put them there, and the courts cannot put them there.

Erroneous Construction in the *Stanley County Case* by the State Supreme Court of the Words "any Railroad in which the CITIZENS OF THE COUNTY MAY HAVE AN INTEREST," **see said Section 1996 of the Code.**

The Supreme Court of North Carolina held that the words of Section 1996 of the Code, "the citizens of the county may have an interest," do not mean exactly

what they state, but hold that they require that the county, *as a county*, shall have a *pecuniary* interest in the railroad, in order that Section 1996 may apply to it. On this point it seems only necessary to state that no such words occur in Section 1996. This construction by the Supreme Court of North Carolina takes out the words "*the citizens*," and inserts the word "*pecuniary*," and thus it holds that the words "any railroad in which the citizens of the county may have an interest" are to be construed as follows, to wit: "Any railroad in which the county has a pecuniary interest." A mere statement of such a distorted construction of this language of the code is enough to refute any such construction. Here, too, again we may call the attention of this Court to the language of Article V., Section 6, of the constitution of the state of North Carolina when it was dealing with the question of the right of the State to issue railroad aid bonds. There it refers to a railroad "in which the State has a *direct pecuniary interest*." This section 1996 of the Code was adopted about one year after the said Article V., Section 6, of the constitution. Doubtless the legislators had before them this provision of the constitution, or, at least, were familiar with it. The difference in the language was obviously intentional and significant.

The history of the adoption of this provision of the State Constitution as to State Railroad Aid bonds shows that it had a different purpose from that of the Code (§§ 1996–2000).

What is now Section 5 of Article V. of the constitution was originally reported to the Constitutional Convention of 1868 by the committee on finance as follows:

"Until the bonds of the State shall be at par, the General Assembly shall have no power to contract any new debt or pecuniary obligation in behalf of the State, except to supply a casual deficit, or for suppressing invasion or insurrection, unless it shall in the same bill levy a special tax to pay the interest annually" (Journal, p. 354).

An amendment was proposed as follows:

"And the General Assembly shall have no power to give or lend the credit of the State in aid of any person, association or corporation, except to aid in the completion of such railroads and other works of internal improvement as are unfinished, and in which the State has a direct pecuniary interest, unless the subject be submitted to a direct vote of the people of the State, and be approved by a mojority of those who shall vote thereon" (Journal, p. 354).

This proposed amendment was further amended as follows:

"Mr. Tourgee moved to amend by striking out 'are' in the fifth line and inserting 'may be;' insert after the word 'unfinished' in the fifth line '*at the time of the adoption of this constitution.*' Strike out 'and' in the fifth line and insert 'or.' This amendment of Mr. Tourgee's was accepted, and the proposed amendment, as amended, was adopted (Journal, p. 354).

On pages 85 to 90 of the convention journal is a report made January 29th, 1868, by the Treasurer of the State to the President of the convention as follows:

"SIR—I have the honor, in response to the resolution of your honorable body requesting me to furnish the convention a 'statement of the indebtedness of the State, to what parties or sources, what amount to each, what is the amount of her endorsement for railroad or other improvements, what further endorsement of railroad bonds she is directed to make under any existing law or regulation, and, when passed, what property, or assets, or securities, said State holds for or on account of said indebtedness, what amount of stock the State holds in the several corporations of this State, and

what amount of dividend or interest she receives annually from each source.' " * * *

The report of the Treasurer shows that, prior to the meeting of the convention, the State had undertaken to issue its bonds in aid of certain railroads, and that, under the statutes then existing, the State was liable to be called upon for the issue of additional bonds, or for the guaranty and payment of additional bonds, and the State owned stocks in certain railroads, thus having a direct pecuniary interest in them. The amendment made to Section 5, Article V., of the Constitution above quoted was designed to enable the State, *without a vote of the people*, to carry out its contracts already entered into on railroads, &c., already then begun and to protect its interests in the railroads, &c., already begun. *With a vote of the people* the State was allowed to aid railroads without restriction. As the Constitution, Article VII., Section 7, did not allow counties to incur any debt in any case (except for necessary expenses) without a vote of the people, the reason for the provision as to *unfinished* railroads in case of State aid, did not apply to counties, and was purposely omitted in the Act of April 10, 1869 (now Sections 1996–2000 of the Code).

This view is supported by the following decision rendered by the North Carolina Supreme Court in 1869, the year following the Constitutional Convention.

In *Galloway vs. Chatham Railroad Company*, 63 N. C., 147, the suit was to enjoin an issue of State bonds in aid of a railroad company. The court held that the bonds were unauthorized under the provisions of the constitution. In the course of the opinion (PEARSON, C. J., giving the same) the court say, with respect to the restrictions on the power of the state to

incur debt, speaking of the debt existing at the time of the adoption of the constitution of 1868 (p. 153):

"It will be found that most of the public debt was incurred in three modes: 1st, by subscribing for stock in railroad and navigation companies, and issuing bonds to pay for the stock, the state becoming a member of the corporation; this is the heaviest item, and amounts to say eight millions of dollars; 2nd, by issuing bonds of the state and exchanging such bonds for a like amount of the bonds of the corporation, the state not becoming a stockholder and taking collateral security of more or less value; this is the next heaviest item and amounts to about three millions of dollars; 3d, by endorsing the bonds of corporations and taking a mortgage or some other collateral security; this item amounts to about two millions.

"These are the three modes by which, judging from the past, it was apprehended the public debt might be so run up as to ruin the credit of the state and tarnish her honor and her reputation for good faith.

"* * * (p. 155). The suggestion that the credit of the state was given by this statute to aid in the completion of an *unfinished railroad* was not strongly urged on the argument, and indeed it could not be. An unfinished road is one that has been begun and partly worked on, and such a road is made an exception, on the ground that it might be proper to finish it in order to prevent a sacrifice of the work that had been done. There is no evidence that such was the fact in regard to this road. The other suggestion, that the state has a direct pecuniary interest in this road, was properly abandoned. The word '*has*' is in the present tense. The exception is obviously confined to roads in which the state had a direct pecuniary interest at the time of the adoption of the constitution; otherwise the state might, by a subscription for stock, become directly interested in every railroad or navigation scheme that should thereafter be projected, and thus the restrictions of the constitution would be of no effect whatever."

Note the difference between the language of the Constitution as to State aid bonds and the language of the Code as to county aid bonds. The Constitution says "*has*," and note the comments of the court on the present tense. The Code says "*may have*," &c., &c.

Of course such of these decisions of the Supreme Court of North Carolina as were rendered after the bonds in question in the present case were issued are not binding upon this Court, and it is both the right and duty of this Court to construe this language of sections 1996–2000 according to their natural and proper meaning.

Within the meaning of Section 1996 of the Code the citizens of a county have an interest in any railroad running into or through the county, and this section would be confined accordingly to *such* railroads.

OUR SECOND PROPOSITION *as to the Code is that even if the language of these sections of the Code—1996 to 2000—is to speak from the time of their earliest adoption—to wit, April 10, 1869—and if these sections are not prospective in their operation, they, nevertheless, authorized the issue of the bonds now in suit by Wilkes County, as they were issued in aid of a railroad which had been begun before April 10, 1869, and was then not completed.*

There cannot be the slightest foundation in this language of section 1996 of the code for saying that it applies only to the completion of a railroad which had been begun *when the constitution of 1868 was adopted.* There is not a word or a syllable in the said provisions of the code lending any support to any such view. The utmost that could be claimed would be that these sections applied to the completion of a railroad which had been begun at the time these sections were adopted, which was in 1883, or, at the very earliest, April 10, 1869. Even if this earlier date, April 10, 1869, be the one selected, then it is, nevertheless, true that these sections of the code would apply to and authorize these Wilkes county bonds, since this railroad might be a railroad referred to in these sections,

and the sections might properly speak of the subscription to the stock of this railroad company as necessary to aid in the completion of this railroad. This company had been chartered by the ordinance of the Constitutional Convention, ratified March 9, 1868, over one year before the passage of these code sections. Section 1 of the ordinance of March 9, 1868, authorized the construction of the *main line* into Wilkes County. A glance at the map will show this. The line into Wilkes County was not a *branch* as erroneously contended in the brief of Judge AVERY. Forsyth county, as shown in the two Forsyth county cases above quoted, had in 1868 issued bonds to aid in the construction of this road, such bonds being ordered issued at the June term, 1868, of the board of commissioners of Forsyth county. This railroad, then, was a railroad projected and begun and under construction at the time of the adoption of these sections of the code, April 10, 1869. Obviously, therefore, these sections of the code apply to this issue of bonds by Wilkes county to aid "in the completion" of such railroad.

The County is Estopped by the Recital in the Bonds.

Inasmuch, however, as these sections of the Code—1996 to 2000—gave lawful authority to issue bonds to aid in the completion of a railroad, there was, under the familiar doctrine, *power to issue bonds;* and whether or not all of the facts existed, such as that the railroad had been begun and was unfinished at the time of the adoption of this act, April 10, 1869, is a matter *in pais* to be determined by the county commissioners before the bonds are issued; and inasmuch as they have

issued these negotiable bonds, and they are in the hands of *bona fide* holders, such holders are entitled to assume that they have been issued under and pursuant to the power which existed. This is under the familiar rule that, if upon any state of facts there was lawful authority to issue negotiable paper, then the holders of such negotiable paper are entitled to assume that such facts existed.

No "policy" of the State against Railroad Aid Bonds. Provision as to "unfinished" railroads applies only in case of State aid bonds.

The learned counsel for the county apparently attempts to make an argument that there was a *policy* of the State of North Carolina, as evidenced in the constitution of that state, adopted in 1868, against issuing railroad aid bonds by either the state or counties, except in aid of roads which were unfinished at the time of the adoption of the constitution. There was no such policy. The only policy was this—that no State bonds should be issued to aid any *new* railroads, unless there should be a vote of the people, but with such a vote the state could aid any railroad, whether it had been begun or not at the time of the adoption of the constitution. If the railroad had been begun and was unfinished at the time of the adoption of the constitution, state bonds might be issued in aid thereof without any vote of the people. *As to counties, there was no distinction made as to whether the road was finished or unfinished at the time of the adoption of the constitution.* A vote of the people of the county was required for the issuance of railroad aid bonds of a county in either case, whether a road had been begun or was a new

railroad, and there was absolutely no distinction whatever made in the constitution between new roads and unfinished roads so far as respects county aid, and no such distinction existed in the Code, or in any other provisions of the statute.

Even the learned counsel for the county would admit that if there had been a special act authorizing the issue of these bonds, or if the act of February 20, 1879, had been properly enacted by the legislature, there would have been clear constitutional power to issue these bonds. How, then, can the learned counsel seriously argue that the constitution of the state of North Carolina has adopted any policy as against the issue of county railroad aid bonds.

Further, as to Code Sections 1996-2000. These sections give power to issue the bonds. The objections of the County further answered.

The learned counsel for the county says, in substance, in regard to the Code provisions, Sections 1996 to 2000, originally adopted April 10, 1869, these are to be construed the same as the provisions in the constitution of the state, Article V., Section 4, in regard to the issue of railroad-aid bonds by the state, stating: "It was deemed a part of the policy of the state to place its subdivisions under the same restrictions as the state, by preventing them from aiding in the completion of a road not then begun." There is not anything in the Code or in any of the statutes or in the Constitution of the State which supports any such

view. The significant language of Article V., Section 4, of the constitution of the state, as applied to *state* railroad-aid bonds, is purposely omitted when the constitution deals with *county* bonds in Article VII., Section 7, and is purposely omitted from the said provisions of the Code. The Supreme Court of North Carolina, in *Commissioners of Stanly vs. Snuggs*, 121 N. C., 394, committed an obvious and glaring error in holding that the same provision applied to a *county* as to a *state*.

We may note in passing that the learned counsel for the county, in dealing with Article V., Section 4, of the constitution of North Carolina in connection with his argument in respect of code sections 1996 to 2000, would omit the significant words "*a direct pecuniary*," so that he would make a clause in that section, as respects state aid, read "a railroad which may be unfinished at the time of the adotion of the constitution, or in which the state has *an interest*," whereas that section of the constitution really reads, "except to aid in the completion of such railroad as may be unfinished at the time of the adoption of this constitution, or in which the state has a *direct pecuniary* interest, unless the subject be submitted to a direct vote of the people of the state," etc. The claim of the learned counsel—that a "direct pecuniary interest" is required in the case of *county* bonds—is erroneous, and the decision of the Supreme Court of North Carolina in the case of *Stanly County vs. Snuggs*, 121 N. C., 394, is plainly erroneous.

The learned counsel for the county speaks of the case of *Stanly County vs. Snuggs*, 121 N. C., 394, and says, in substance, that in that case the words in code section 1996, act of April 10, 1869, "in the completion of any railroad in which the citizens of the county may

have an interest" were construed as speaking of railroads *unfinished* at the time of *the passage of the act or the adoption of the constitution.* The fact is, the court, in the case of *Stanly County vs. Snuggs*, held that those words in the code were retroactive and went back to the time of the adoption of the constitution (April 24, 1868), although there was not a word or syllable in the said Code, or in the act of April 10, 1869, to indicate that they were intended to have any such rotroactive effect. The learned counsel continues (p. 19, bottom) :

> "It was deemed a part of the *policy* of the state to place its subdivisions under the same restrictions as the state, by preventing them from aiding in the completion of a road not then begun."

The fact is that there was no "policy of the state" to prevent a county from aiding in the completion of a road not begun at the time of the adoption of the constitution, or at the time of the passage of the act of April 10, 1869, nor even to prevent the state from aiding such road. The restriction was that a county should not aid any road begun, or not begun, unless by a vote of the people. The restriction on the part of the state was less than this, to wit, the state was permitted, *without* a vote of the people, to aid any railroad which had been begun, and was permitted to aid *any* railroad (begun or not begun) *with* a vote of the people.

The learned counsel for the county, would omit from his quotation of Article V., Section 4, of the constitution, the significant words "*a direct pecuniary*" [interest], which apply only to *state* railroad aid *without* a vote of the people, and then goes on seriously to argue that the same direct pecuniary interest is necessary in the case of aid by a county, although neither

the code nor the constitution makes any such provision. The bare statement of such an argument is enough to refute it.

But however this may be, it is obvious from the *Hill* and *Belo cases* that this railroad had been begun before the passage of the act of April 10, 1869.

Furthermore, whether or not the railroad had been begun before April 10, 1869, or even before the adoption of the constitution (April 24, 1868), was a fact *in pais* to be determined by the county commissioners before they issued the bonds, and not a matter with which the holder of these negotiable municipal bonds is concerned.

The Code of North Carolina is one act (Code, Section 3876), and went into operation November 1st, 1883 (Code, Section 3866).

At the end of volume 2 of the Code, at bottom of page 603, *it is declared that the requirements of Sec.* 14, Article 2, of the Constitution of North Carolina, have been complied with in the passage of the Code; and this is also admitted.

The bondholders are not estopped by the recital, on the face of the bonds, that they were issued under the provisions of the act of 1879, *provided it can be shown* that the commissioners of Wilkes county, in ordering the election and issuing the bonds, *acted also* under the provisions of sections 1996 and 1997 of the Code.

It is apparent that they did. They gave notice of exactly thirty days, the time required by section 1997 of the Code; the order speaks of the matter to be submitted as a "proposition," the word used in said section. *Besides, article 21 of the complaint declares that these bonds were, as a matter of fact,* issued under the provisions of these sections, as well as of the charter and the amendatory acts of 1868, 1879 and 1881. And

article 21 of the answer does *not deny* this fact, but merely denies the *legal conclusions* arising from said admitted fact.

So it is admitted that the Board of Commissioners was proceeding under the provisions of sections 1996 and 1997 of the Code, as well as under the *acts set out in the record and under the charter.* If this be true, then the bonds are valid, notwithstanding the recitals in the bonds, provided the Code provisions conferred on the board the power to issue them.

Knox Co. vs. Ninth Nat. Bank, 147 U. S., 91.
Cairo vs. Zane, 149 U. S., 122.
Anderson, &c. vs. Beal, 113 U. S., 227.
See further on this point, *ante*, pp.

But the respondents contend that these sections did not authorize the issuance of the bonds for the following reasons:

I. Because said statutes are not local and special as required by sections 1, 6 and 7 of the Constitution of North Carolina.

The conclusive answer to this is that there is not a particle of evidence of any kind to be found anywhere in the record that the payment of the interest or principal of these bonds will require a county tax to exceed the double of the State tax. But, further, under the decisions of the Supreme Court of North Carolina this constitutional provision does not affect the validity of the bonds, and in no view of the case could affect more than the method of having a valid, existing and binding obligation *paid.*

"The legislative practice has uniformly been, as far as we know, to give approval in advance, and thus confer the requisite legal authority to levy special taxes beyond the assigned limits, though, if given after the levy, it would doubtless be equally effectual"

(Cromartie vs. Commissioners, 87 N. C. Reps., on p. 140*)*.

And in *Herring vs. Dixon*, 122 N. C., on page 423, the Supreme Court of North Carolina again distinguishes between the power to contract a valid indebtedness without special legislative sanction and the power to levy a tax to pay said indebtedness when it says: "In *Vaughn vs. Commissioners*, 117 N. C., 429, while it was held that the commissioners could *incur a debt* for necessary expenses, without a vote of the people, it was not held that they could *levy a tax* in excess of the constitutional limit to pay it without special approval of the legislature."

So under the rulings of *Cromartie vs. Commissioners* and of *Herring vs. Dixon* the commissioners have the right to contract a valid debt without a special act, but only the process of collecting its payment would be affected by section 6, article 5, of the Constitution.

But this argument is useless, as the record contains no evidence whatever, that the payment of this obligation by the county will require a tax exceeding double the State tax.

Subscriptions to railroads, under General Statutes similar to section 1996, have been upheld by the Supreme Court of the United States:

"Where a State law confers a general power on a county to subscribe to the stock of any railroad in the State for any amount not exceeding $100,000, the county may subscribe to the stock of two railroads $100,000 each" *(Chicot County vs. Lewis*, 103 U. S., 164*)*.

In *Davies vs. Huidekoper*, 98 U. S., 104, the court upholds a subscription under a General Statute of Missouri almost identical in language with section 1996.

The following are sections 1996 and 1997 of the Code of North Carolina:

Section 1996 of the Code of North Carolina.

"The boards of commissioners of the several counties shall have power to subscribe stock to any railroad company or companies when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest."

Section 1997 of the Code of North Carolina.

"The board of commissioners of any county proposing to take stock in any railroad company shall meet and agree upon the amount to be subscribed, and, if a majority of the board shall vote for the proposition, this shall be entered upon the record, which shall show the amount proposed to be subscribed, to what company, and whether in bonds, money or other property, and thereupon the board shall order an election, to be held on a notice of not less than thirty days, for the purpose of voting for or against the proposition to subscribe the amount of stock agreed on by the board of county commissioners. And, if a majority of the qualified voters of the county shall vote in favor of the proposition, the board of county commissioners, through their chairman, shall have power to subscribe the amount of stock proposed by them and submitted to the people, subject to all the rules, regulations and restrictions of other stockholders in such company or companies. Provided, that the counties, in the manner aforesaid, shall subscribe from time to time such amounts, either in bonds or money, as they may think proper."

Re the "interest of the citizens of the county."

In addition to what we have already said on this subject we add the following:

The appellants further contend "that said sections of the Code failed to authorize the issue of said bonds, because said North Western North Carolina Railroad

was not, within the meaning and proper construction of section 1996 of the Code, one in which the citizens of the County of Wilkes had an interest."

Aside from the common sense of the matter, the grammatical construction of section 1996 forbids the interpretation put on it by appellants; to wit, that, before a vote could be taken by the citizens of Wilkes County, the said citizens must have a direct pecuniary interest in the road; that is, must be stockholders in the road. The words of the statutes are "in which the citizens of the county may have an interest."

The words are not "citizens of the county may have an interest," or "certain citizens," but "*the* citizens of the county."

So, if pecuniary interest is meant, *every citizen* of the county must have stock before a county subscription could be voted, which is a *reductio ad absurdum*. But, if this was meant, the statute should have read, "in which the citizens of the county may have interests." So that, assuming that this interest means a pecuniary interest, every citizen of the county must have stock, and that stock must be "an interest," or, in other words, that stock must constitute only one interest, one block of stock, owned in joint ownership by every citizen of Wilkes County—a palpable absurdity.

It is clear that the interest spoken of is the interest that the citizens of the county might have in any public improvement.

"What else does this doctrine mean, if not that building a railroad, though it be built by a private corporation, is an act done for a public use? And the reason why the use has already been held a public one is that such a road is a highway, whether made by the government itself or by the agency of corporate bodies, or even by individuals, when they obtain their power to

construct it from legislative grant" (*Olcott vs. Supervisors*, 16 Wallace, 678).

Re the "completion" required by the Code.

It is also objected by the attorney for the County Commissioners, "Nor was the subscription made necessary to aid in the completion of the same" [that is, the railroad].

The North Western North Carolina Railroad was begun to be built in October, 1868, and was finished to Winston, N. C., in 1872 or 1873; and, on November 6th, 1888, when the bonds were voted, work was in progress on that part of the road from Winston to Wilkesboro. This fact is shown by affidavits in the record.

It will be admitted, however, by appellants' solicitors. Indeed, it is a matter of public notoriety.

See page 79 of record.

The sections 1996 of the Code were first enacted into law April 10th, 1869, about six months after the work had been commenced on the North Western North Carolina Railroad.

The statute of April 10th, 1869, was re-enacted in Battle's Revisal and went into operation January 1st, 1874; it was again re-enacted in the present Code of North Carolina, and went into effect November 1st, 1883. So that, if the word "completion" be construed in its strictest sense, these bonds voted for on November 6th, 1888, were voted in aid of the completion of an unfinished road, of a road upon which the work of construction was going on on the very day these bonds were voted by the citizens of Wilkes County.

"No reasonable construction of this act will require that the road to be aided should be actually built be-

fore the county was authorized to give it aid. That theory would, no doubt, add greatly to the security of the county and would relieve it from many of the perplexing questions which so commonly arise. If, however the road were actually built, no aid would be needed in its construction. The aid might, in that event, be useful to its stockholders, or might relieve it from embarrassments, but a road which is built can neither need nor receive aid in its construction. That is a fact accomplished" *(Kenicott vs. Supervisors*, 16 Wallace, 452*)*.

These objections to the giving of the power to the board to issue the bonds by sections 1996–2000 have been made by the county in Article 21 of their answer.

Another defense has been urged in and sustained by the State Court, to wit: That the provisions of section 1996 refer to only those roads that were *unfinished in April, 1868, the time of the adoption of the constitution of 1868.*

"This reasoning leads us to the still farther conclusion that, at the time when the act of 1868–9 was brought forward in the Code, Section 1996, and the four succeeding sections, it could have had reference to no cases, except those where the counties had a pecuniary interest in unfinished railroads at the adoption of the Constitution of 1868" *(Commissioners vs. Snuggs*, 121 N. C., on page 403, 1897*)*.

This was first decided in 1897 and is one of the most astonishing legal solecisms into which so able a court ever fell. The statute of April 10th, 1869, section 1996 of Code, made no reference to the Constitution of 1868, nor to any other point of time in the past. Every word in section 1996, denoting tense, is in the future tense, and the Code went into effect November 1st, 1883.

It is an universal rule of construction that all statutes are prospective in their operation, unless the statute itself says to the contrary.

"No statute should be given a retrospective operation unless its words expressly require such construction" *(State vs. Littlefield*, 93 N. C., 614*)*.

What words in section 1996 require that its operation be referred back to April, 1868, fifteen years before it was re-enacted in the Code, and one year before it was ever put in any shape on the statute books of North Carolina? Upon the same false principle of construction (a principle that can find no support in any book ever written on the suject), if a section 1996 should be re-enacted in the Code of 1900, it would have no application to any road that might be built during the next century, but would apply to roads incomplete in the year 1868, thirty-two years before its enactment! But this very principle has been passed on by the Supreme Court of the United States in *James vs. Milwaukee*, 16 Wall., 159. In that case a statute authorized a city to lend its credit to any railroad company incorporated and organized; and this court held that companies thereafter organized were intended to be included, and the statute was applicable to them, as well as those then in existence. This court said (pp. 160, 161):

"The defendant in error insists that the power conferred was confied to companies already in existence at the date of the act, and such was the opinion of the court below. We entertain a different opinion."

In that case, there was no word denoting the future tense, no "shall," as in section 1996, but the only words used were the adjectives, "incorporated and organized."

The cases relied on by the county's solicitors, concerning the power to tax, being conferred by special act, in answer to the contention on the part of complainants, that the commissioners had the power to

issue the bonds under the sections of the Code, set out above, can have no application to a case of the kind at bar. The Supreme Court has said, in a late case, *City of Charlotte vs. E. D. Shepard & Co.*, 122 N. C., page 603, that "where such a corporation," speaking of a municipal corporation, "has thus acquired the right to create a debt, and issue the bonds, *this power carries with it*, the power to levy the taxes necessary to pay said bonds, and the accruing interest thereon" *(Ralls vs. County Court*, 105 U. S., 733; *U. S. vs. New Orleans*, 98 U. S., 381*)*.

These sections of the Code, 1996 and 1997, are as much the law of North Carolina as any other sections of the Code are; they are as much the law as the Constitution itself is. In the *Stanly County case*, the Circuit Court of Appeals, in 1899, held itself bound by the decision of the Supreme Court of North Carolina *(Commissioners vs. Snuggs*, 121 N. C., 401*)*.

In the *Snuggs Case* the Supreme Court upheld the sections of the Code referred to, deciding, however, that they did not apply, the road not being an unfinished road, and the citizens of the County not having an interest in the same.

Estoppel of the County by the recitals in the bonds.

In the *Snuggs case* there was no pretense that any bondholder was a party, it being, as we contend, an *ex parte* proceeding. If any bondholder had been a party, the decision would have been different, because, in the body of the bonds issued by *Stanly County*, there was a recital that they were issued in pursuance of Sections 1996, &c., of the Code. This shows the corporate

authorities acted with these provisions of the Code before them, and that they passed upon all questions left for their determination, as said by Justice BREWER in his opinion in *The Mercer County Case*, on page 601 of the volume 170 U. S. R. It shows these corporate authorities were acting in good faith, and wanted to perform their duty according to law.

On page 307, Vol. 87 Federal Reporter, in the case of *Township of Ninety-six vs. Folsom*, the Circuit Court of Appeals, speaking through Judge JACKSON, says:

> "It will be observed, from the inspection of these bonds, that their recitals show upon the face of the bond a compliance with the law under which they were issued. The purchaser had a right to assume that all the conditions of the law were complied with, authorizing the issue of the bonds. The question whether they were issued in compliance with the law was a question that properly belong to the authorities, who were authorized by the acts of the legislature to issue the bonds."

After what was stated by the Supreme Court of the United States in the present case, with reference to the *Hill* and *Belo cases*, and with reference to the validity and continued existence of the said ordinance of 1868, some portions of the foregoing argument might well have been omitted from this brief. It has seemed best to us, however, after reading the brief of the learned counsel on the other side, to make such argument here in full, not omitting those parts which relate to the questions on which the Supreme Court of the United States has already given its opinion, namely,

the validity and continued existence of the said ordinance.

This Court, therefore, should hold the said bonds valid, and affirm the judgment of the Circuit Court.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
CHARLES PRICE,
Of Counsel for Appellees.

27528

Supreme Court of the United States,

OCTOBER TERM, 1901.

No. 558.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY AND JOHN H. JOHNSON, Sheriff, and *ex officio* Treasurer of Wilkes County,
Petitioners.

vs.

W. N. COLER & COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION TO GRANTING WRIT.

CHARLES PRICE,
Of Counsel for Respondents.

This case was before this Court in 1900, on certificate from the United States Circuit of Appeals, Fourth Circuit, (*Wilkes County vs. Coler*, 180 U. S., 506).

This Court expressly held that, if Wilkes County stood in the same category with Forsyth County, then the bonds in question were valid, legal bonds.

In this decision Justice HARLAN, delivering the opinion of the Court, laid down propositions of law, deemed by a majority of the Circuit Court of Appeals, decisive of the *Stanly County case*, in favor of the validity of the bonds issued by that county. That case stood for reargument in the Circuit Court of Appeals, upon a petition to rehear, and was ordered to await the decision of the Supreme Court, upon the questions certified as before stated (see Mr. Price's brief in Stanley case, filed 5th of May, 1902, page 8).

At the May Term of the Circuit Court of Appeals, for the year 1901, as we say, both cases stood for argument, the *Wilkes case*, sent back, for further proceedings, and the *Stanly case*, upon petition to rehear.

Both cases were set down for argument at the same time, the questions involved being, in some respects, similar. The record containing the answers to the questions certified, in the *Wilkes case*, was received from the Supreme Court of the United States during the May Term of the Court, and we, as counsel for the respondents, expressed to the Court our unwillingness to proceed with the argument then, supposing the cased would stand for argument at the next term, November, 1901. Indeed, supposing such to be the practice, we had not prepared briefs in the cases.

The counsel for the counties, however, insisted that the argument of the cases be proceeded with, and the Court, consisting of Circuit Judge GOFF, Judge MORRIS and Judge BOYD, so directed.

It should be noted that Circuit Judge GOFF and Judge MORRIS both sat in the *Stanly case*, when heard and decided before. It is also to be noted that Judge

BRAWLEY, who had in the former hearing sat with Judges GOFF and MORRIS, was in attendanue upon that session of the Court, May Term, 1901.

We mention these facts in view of the allegations of bias on the part of Judge BOYD, as they are contained in the petition of the County of Wilkes, and the argument of counsel in the brief filed in support of the same.

After the decisions in these cases filed at the February Term of the Circuit Court of Appeals, for the year 1902, the learned counsel discovers that his Honor, Judge BOYD, was biased, and disqualified to sit in this case, having been counsel for the railroad company in years past.

We are not aware of any such allegation made in a similar paper to this petition for the issue of a writ of *certiorari;* nor do we believe another can be found in the records of the Court.

The remarkable thing in connection with this petition is that it has lain in the office of the Clerk ot this Court for two months, after having been published in the newspapers in North Carolina, immediately after it was prepared.

It was not pretended that the publication of matter, which went to the discredit of a defenseless Judge, could, in any way, advance the cause of the petitioners or show the incorrectness of the decision of the Court, and we are at a loss to know what its purpose was.

Even now we cannot conceive what the purpose was. It is not true that Judge BOYD was biased, or that he had ever in any manner considered the case, or heard anything about the bonds or that he was or is in any way whatever interested therein.

Not knowing how to meet this attack upon Judge BOYD, an upright, able, conscientious Judge, we in-

formed him of this allegation in the petition and re-received from him a letter, in relation, thereto, the original of which is filed with the papers in this case.

The letters is as follows :

GREENSBORO, N. C., April 19th, 1902.

HON. CHAS. PRICE,
Salisbury, N. C.:

DEAR SIR—I am in receipt of your favor of the 17th inst., relative to the petition lately filed in the Supreme Court, for writ of *certiorari*, in the suit of W. N. Coler vs. The Board of Commissioners of Wilkes County, decided at February Term of the Circuit Court of Appeals for the Fourth Circuit. My attention had already been called to the averments relative to myself contained in the petition filed by the counsel for the Board of Commissioners. I am at a loss to know from what source the counsel who drafted this petition and made affidavit to it derived his information, upon which he based the allegations referred to, for very certainly they are unfounded in fact. You know, as you state in your letter to me, that the statement that you were furnished with copies of Judge MORRIS' opinions in these bond cases, is untrue. It is also untrue, that I was, in any way connected as counsel or otherwise, in the issuing or sale of the Wilkes County bonds. I was never consulted as to their validity, and gave no opinion to Col. A. B. Andrews or any other person, with reference to same. It is true that for several years I was employed as local counsel for the old Richmond & Danville Railroad Company, but my duties were confined to the County of Guilford, and it is my recollection that I was not in this employment in the years 1888 and 1889. You will perhaps recall the fact that in one or both of these years, I represented, as attorney, persons having claims against the Richmond & Danville Railroad Company, for injuries received at Fat Nancy trestle, near Orange Court House, Virginia, and collected several large amounts from the Company on this account. But, however it may be, as to my relations with the Richmond & Danville Railroad Company, in the year 1889, I repeat, that I had nothing whatever to do with the Wilkes County bonds, as counsel or otherwise, and if the Richmond & Danville Company was in any way interested in these bonds I had no knowledge of it. I do not know what latitude will be allowed the counsel by the Supreme Court in

filing petitions for *certiorari*, but it is certainly a practice heretofore unheard of to incorporate in such petitions reflections upon the lower Courts, or upon individual Judges who compose such Courts. I sat upon the Circuit Court of Appeals, not upon my own motion, but because I was required to do so by law, and there was no suggestion or intimation at the time the Wilkes County bond case was argued that I was in any way disqualified to hear it; and, indeed, there was no ground existing upon which any such suggestion or intimation could have been made. In passing upon this case I had only one object in view, and that was to administer the law as I understood it. If, for discharging a duty which thus devolved upon me according to my honest convictions, I am to be made the object of criticism and reflection in a petition filed in the Supreme Court, then no Judge of a lower Court will have protection from such assaults in any case. I am,

Yours very truly,
(Signed) JAS. E. BOYD,
U. S. District Judge.

In this connection, we have to state that no railroad company is in any way connected with these bonds, or has any interest whatever in these bonds or in the result of this litigation.

We take it, that this Court will consider that, in this charge, against Judge BOYD, a wrong, and an injustice has been done him, and we have copied his letter in this brief, that the Court may see that the charge is wholly untrue.

The allegation, as to bias of Judge BOYD, having nothing to sustain it, in fact, that part of the brief of the counsel, addressed to its consideration, we dismiss, without further notice, than to say, it is gratuitous, cruel, and merits the rebuke of the Court.

The first point made in the brief of counsel for the county seems to be a copy of what was set out, in the brief for the petitioners, in the *Stanly case*, filed on the 5th of May, 1902.

We contend that there is not a conflict between the decisions of the Supreme Court of North Carolina, and the Circuit Court of Appeals. The case of the *Commissioners vs. Call*, 123 N. C., 308, was one evidently gotten up to effect a repudiation of the honest debt of Wilkes County. When that case reached the Supreme Court of North Carolina, the parties, plaintiffs and defendants, were not adverse, and as said by Judge SIMONTON in the *Stanly case*, on the Circuit, "were practically one." In the published volume no counsel appeared, except the counsel for the plaintiffs, a fact which served to impress the Justices of the Court, who dissented from the judgment as entered. Justice FURCHES, now Chief Justice, with whom concurred FAIRCLOTH, late Chief Justice, on page 336, Volume 123, N. C., says:

"The Court, in its opinion, says that certain positions were strenuously insisted on by the defendant. I think this must be a mistake, as this case was not argued before us, either by brief or by oral argument on behalf of the defendants. Mr. Turner and Mr. Wellborn, by leave of the Court, made themselves parties defendant after the action was brought, but they have given the case no further attention. Why they did this I do not know. * * * But, as to the conduct of the case before this Court, it has been unilateral."

In this, as before suggested, the Chief Justice FAIRCLOTH concurred. The truth is, if the counsel for plaintiffs had called the attention of the Court to the fact, the case was before the Court erroneously, because the time in which the appeal was to be perfected had expired before Turner and Wellborn were made parties (pages 69, 70, 71 and 72 of Record).

Again, by reference to the answer of Clarence Call, defendant (page 79, Printed Record), it will be seen that he refused to perfect the appeal, after being importuned to do so by plaintiffs. He alleges in his answer that, "by some means unknown to this defendant," Wellborn and Turner became parties to the proceedings after he had refused to appeal.

He further says the plaintiffs offered to pay his attorneys' fees and costs of the appeal, if he would perfect the same.

It will be hard for the Court, in the light of the record, to escape the conclusion that the case was one gotten up for the purpose of repudiating this honest debt of Wilkes County.

Justice DOUGLAS, in his opinion, *Commissioners vs. Call*, 123 N. C., 308, concerning these Wilkes County bonds, said:

"The bondholders themselves *could* have become parties to any such proceedings, and *would* have been gladly heard by us, but the mere fact that *they deliberately refrained from any participation in the defense*," etc., etc.

The learned Justice thus shows *that he did not believe* from the record that Turner and Wellborn were *bona fide* holders of even *one* bond, or that they actually participated in the defense of the case in the State Court.

As we insist, the record shows that this proceeding in the State Court was one imposed upon that Court to effect a repudiation of an honest debt. After the decision of what was known as the *Oxford Bank case* by the Supreme Court of the State, 119 N. C., 214, enterprising lawyers began to look up cases where bonds were issued without full compliance with the

constitutional requirements as to the entry of the yeas and nays upon the journals. And thus began the *Stanly case* followed by this case.

In the dissenting opinion of FAIRCLOTH, Chief Justice, in the *Stanly case*, in the closing paragraph, on page 410, Vol. 121, N. C., he says :

" They have recognized and paid the annual interest on these bonds for several years without objection and it is *possible* that they never discovered the absence of the words 'yea' and 'nay' on the journals until since the decision of this Court in *Bank vs. Commissioners*, 119 N. C., 214, decided in 1896."

We have stated, with some detail, the history of this litigation, to show how these cases were begun, and prosecuted, so that it may appear to this Court, *that they are entirely without merit*, and were for the purpose, as before said, of repudiating honest debts.

These decisions of the State Court are not such as are contemplated in the case of *Forsyth vs. Hammond*, 166 U. S., 506, relied on by petitioners.

Looking at the case of *Commissioners vs. Call*, 123 N. C., 308, the substance of the decision is, 1st: " Legislation authorizing the creation of county indebtedness, must conform to constitutional requirements," and 2d: " A county bond, stating on its face the Act under which it is issued, is notice to the holder, and estops him from contradicting the statement."

Here we call attention to the following from Judge MORRIS' opinion :

" The recitals of the bonds in suit are as follows :
" 1. That the bond is issued by authority of an Act of the General Assembly of North Carolina ratified the 20th day of February, A. D. 1879. This Act being an invalid enactment and not a law, so far as it undertakes to give power to issue bonds, this recital does

not preclude enquiry as to whether or not there was such a law and the existence of legislative authority.

Northern Bank vs. Porter Township, 110 U. S., 608.

But the recital of an invalid act does not preclude enquiry as to whether there was in existence any other valid legislative authority under which power to issue the bond, could be upheld.

Wilkes County vs. Coler, 180 U. S., 506-524.
Anderson County vs. Beal, 113 U. S., 227.
Commissioners vs. January, 94 U. S., 202.
Evansville vs. Dennett, 161 U. S., 434, 443-444.
Knox County vs. Ninth National Bank, 147 U. S., 91."

It does not pretend elsewhere than in the answer, that this decision estops the complainants, innocent holders of the bonds. It is not a bar, nor will this Court follow the decisions, in passing upon the rights of the parties to this suit.

Carroll Co. vs. Smith, 111 U. S., 563.
Pana vs. Bowler, 107 U. S., 544, 545.
Brooklyn vs. Ins. Co., 99 U. S., 370.
Empire vs. Darlington, 101 U. S., 92.
Wilkes Co. vs. Coler, 180 U. S., 506.

In the outset, we mentioned the fact that this case had already been before this Court, and considering the principles decided, and laid down by the Justice, writing the opinion of the Court, we are justified in the contention, as we believe, that those principles are decisive of the case in favor of the complainants. If such is the fact, then this Court will not grant this writ of *certiorari*.

In *Turner vs. Wilkes County Commissioners*, 173 U. S., 461, the case on writ of error to the North Carolina Supreme Court, this Court pointed out in what cases the jurisdiction would be entertained, and that the rule was different and the principles different, where a case

was taken from a Circuit Court of the United States by writ of error to the Supreme Court (see, also, to same effect *Central Land Company vs. Laidley*, 159 U. S., 103.)

In the case of *Wilkes County vs. Coler*, 180 U. S., 506, when this case was before this Court in answer to the questions certified, this Court said:

1st. "That the circuit court of the United States should have regarded the decisions of the supreme court of North Carolina in *Bank v. Commissioners*, *Commissioners v. Snuggs*, *Rodman v. Washington*, *Commissioners of Wilkes County v. Call* and *Commissioners v. Payne*, referred to in the first certified question, as controlling upon the inquiry whether the legislative enactments of 1868, 1879 and 1881 were passed in such manner as to become, under the Constitution, laws of the State.

2. That the rights of the parties in this case are determinable by the law of the State as it was declared by the State Court, to be, at the time, the bonds here involved, were made in the name of the county, and put upon the market.

Whereupon, it is now here ordered by this Court, that it be so certified to the said United States Circuit Court of Appeals.

You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion of this Court as according to right and justice, and the laws of the United States, ought to be had, the said certificate notwithstanding.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the 19th day of April, in year of our Lord one thousand nine hundred and one."

Mr. Justice HARLAN, in his decision, 180 U. S., 506, 519 says:

"In view of the cases determined by the highest court of North Carolina involving the precise point now under consideration, was the Circuit Court of the United States justified in holding the acts of 1868, 1878, and 1881 to be laws of the State? *Observe that the issue is not as to the construction, meaning or scope of a statute, but whether that which purports to be a legislative enactment ever became a law for any purpose.* May a Federal court disregard the decisions of the

highest court of the State holding that such enactment, in the form of a statute, was never passed so as to become, under the State Constitution, a law ?"

The above paragraph draws the distinction clearly and expressly between "*the issue as to the construction, meaning and scope of a statute*," and the issue, as to "*whether that which purports to be a legislative enactment ever became a law for any purpose.*" The Court holds that the decisions of the highest court of the State upon the question as to whether "an enactment, in the form of a statute, was ever passed, so as to become, under the State Constitution, a law," or not, are not to be disregarded.

In his opinion, he discusses the Ordinance of 1868, the charter of the corporation, and expressly decides that it gave the power to Forsyth County to issue the bonds, and further, that the Supreme Court of North Carolina had so held in two cases, long before the issue of the bonds in question (*Belo vs. Commissioners*, 76 N. C., 489; *Hill vs. Commissioners*, 67 N. C., 367).

Mr. Justice HARLAN expressly stated that the *Belo* case held that the said Ordinance of March 9, 1868, conferred the authority upon *Forsyth County* to make the subscription, and that this was so, independently, of the Act of August, 1868, or of any other legislation (p. 529).

The Supreme Court says at page 529:

"Forsyth County—whose liability on the bonds in suit in that case was directly involved—made the point that it had no authority to issue such bonds. The court, however, held that such authority was conferred by the Convention ordinance of March 9, 1868, and the subscription and bonds made in the name of that county to the North Western North Carolina Railroad Company were upheld as valid, *under that ordinance*, which was recognized as part of the law of the State and as conferring authority on the county of Forsyth to do what it did.

"It results that when the bonds here in question were issued in 1889, it was the law of North Carolina that the ordinance of 1868, constituting the charter of the North Western North Carolina Railroad Company, was not superseded by the constitution of 1868, but was *in force, and, therefore, gave power to counties, embraced by its provisions, to take stock in that company and pay for it in county bonds, just as Forsyth County has done.*"

As to *Wilkes County*, he states the question to be as follows, to wit (p. 529):

"Whether Wilkes county was so situated with reference to the contemplated road that it could be said to have had the same authority as was given to Forsyth county,"

which question, he states, "is not now decided." On page 532 he says:

"Was Wilkes county in the same category with Forsyth county?"

In short, if Wilkes County is in the same category with Forsyth County, then it stands decided by the Supreme Court of the United States, that the said Ordinance of 1868, does, *per se*, give to Wilkes County the authority to issue the bonds in question, irrespective of the legislation of 1868, 1879 and 1881, so that the only question now, is, whether Wilkes County is in the same category with Forsyth County. If so, then the answer of the Supreme Court to the second question applies, which is, that the rights of the parties in the Wilkes County case are determinable, by the law of the State, as it was decided by the State Court, to be, at the time when Wilkes County bonds were put upon the market.

On page 530, 180 U. S., Justice HARLAN further says:

"So far from the *Belo* case turning, in part, upon the ratifying Act of 1868, the Court distinctly adjudged that the bonds were valid, in the hands of *bona fide*

holders under the ordinance of 1868 *without the aid of the Act of August 11, 1868.*"

Further says Justice HARLAN:

"It is the settled doctrine of this Court, that the questions arising in a suit in a Federal Court, of the power of a municipal corporation, to make negotiable securities, is to be determined by the law, as judicially declared, by the highest Court of the State, when the securities were issued, and the rights and obligations of parties accruing under such a state of the law could not be affected by a different course of judicial decisions, subsequently rendered, any more than by legislation. *Loeb vs. Trustees of Columbia Township*, 179 U. S., 472," etc.

That the railroad into Wilkes County was authorized by the ordinance of 1868, and that the bonds in question were also authorized by said ordinance is fully shown in the opinion of Judge MORRIS. He says (Record, p. 114):

"If Wilkes county was in the same category with Forsyth county, the supreme court of North Carolina adjudged in the case of Belo v. Commissioners (1877), 76 N. C., 489, that the power was conferred by the ordinance of the convention, and this ruling remained undisturbed by any subsequent adjudication of the supreme court of North Carolina, and until after these bonds were issued. The power thus held to be sufficient to authorize Forsyth county to subscribe to the stock of this railroad and issue bonds in payment is to be found in the following sections of the ordinance to incorporate the Northwestern North Carolina Railroad Company, ratified March 9, 1868:

"'SECTION 1. That for the purpose of constructing a railroad of one or more tracks from some point on the North Carolina railroad between the town of Greensboro, in Guilford county, and the town of Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county, to some point in the northwestern boundary line of the state, to be hereafter determined, a company is hereby incorporated under the name and style of the Northwestern North Carolina Railroad Company, etc.'

"'SEC. 2. Be it further enacted that the capital stock

of said company may be created by subscriptions on the part of individuals, corporations and counties in shares of one hundred dollars.'

"Section 5 provides that the president and directors shall proceed to locate the eastern terminus of the road and proceed at once to construct said road in five mile sections to the towns of Winston and Salem, in Forsyth county, which portion of the railroad when completed 'shall constitute its first division.'

"Sections 8 and 9 provide that the state should loan its bonds to the railroad company as each five miles is graded and ready for its superstructure to the amount of $10,000 per mile upon the security of a first mortgage of the entire road and its property.

Section 12 is as follows:

"Be it further ordained that the stockholders of said company may pay the stock subscribed by them either in money, labor or materials for constructing said road as the board of directors may determine, and that all counties or towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company, for the government of such towns and counties as are now allowed to subscribe to the capital stock of said company.

"SECTION 13. Be it further enacted that the company shall have the power to construct branches of said road, one of which shall run from the towns of Winston and Salem, by way of Mount Airy, in Surry county, to the line of the State of Virginia."

Section 33 of the charter of the North Carolina and Atlantic Railroad Company, passed in 1852, chapter 136, is as follows:

"SECTION 33. Be it further enacted that it shall be lawful for any incorporated town or county near or through which said railroad may pass to subscribe for such an amount of stock in said company as they shall be authorized to do by the inhabitants of said town or the citizens of said county in manner and form as hereafter provided."

Sections 34, 35, 36 and 37 provide the manner in which the vote of the qualified voters of the counties shall be taken and, if a majority of the qualified voters voting upon the question are in favor of the subscription, provide how the subscription shall be made, and that the county shall negotiate a loan or loans and shall levy taxes to pay the principal and interest.

It will be seen by reading the sections of the charter of the North Carolnia and Atlantic railroad into the charter of the Northwestern North Carolina railroad, as required by its section 12, that every county near or through which the railroad may pass is authorized to subscribe for its stock to an amount authorized by a majority of the qualified voters of the county and to issue bonds in payment and to levy taxes to pay the principal and interest. The first question, therefore, now is, was the railroad which was constructed into Wilkes county by the Northwestern North Carolina Railroad Company a part of the railroad authorized to be built by its charter? If it was, then it would seem that the powers conferred by the charter operated to validate the action of Wilkes county just as the same powers in the same charter were held by the Supreme Court of North Carolina in *Belo v. Commissioners*, to have done in the case of Forsyth county.

The convention ordinance authorizes counties to subscribe to the stock of the railroad company, and it provides that all counties subscribing shall do so in the manner and under the same rules, regulations and restrictions set forth in the charter of 1852, chapter 136. The only restriction in that charter which is drawn in question is the provision that the subscription shall be by counties near or through which the railroad may pass. The railroad, in aid of which the bonds in suit were issued, does pass through Wilkes county.

"It appears to us that it is the same railroad authorized by the convention ordinance. That ordinance authorizes a railroad running by way of Salem and Winston, in Forsyth county, to some point in the northwestern boundary line of the State to be thereafter determined, and contemplated and provided for its being buit by divisions, and enacted that the portion to Salem and Winston should constitute its First division. The piece of railroad for which the bonds in suit were issued does run from Salem and Winston in the general direction of the northwestern boundary line of the State; and, indeed, it seems evident that such a railroad to some point in the northwestern boundary line of the State must pass near or through Wilkes county. The act of February 20, 1879, which is recited in the bonds as the authority for issuing them, definitely located this road running into Wilkes county. It does it by enacting that section 13 of the Convention ordinance shall be amended by adding

certain words which make it read, when so amended, as follows:

SEC. 13. Be it further ordained that the company shall have power to construct branches of said road, one of which shall run from the towns of Winston and Salem by way of Mount Airy, in Surry county, to the line of the State of Virginia (amendment), " *and one of which shall be constructed from the town of Winston and Salem, up the Valley of the Yadkin by way of Jonesville and Wilkesboro, in the county of Wilkes, to Patterson's Factory, in the county of Caldwell, which branch shall be known as second division.*"

Section 2 of the act of February 20, 1879, provides for convict labor being furnished for the purpose of constructing this second division ; and Section 4 provides for bond subscriptions by any county in the State. This act was invalid so far as it attempted to give power to the counties *to create a debt*, because it was not passed as laws for that purpose are required by the Constitution of North Carolina to be passed, *but that invalidity does not affect the sections of the law which deal with other matters.*

Rodman vs. Washington, 122 N. C., 39–42.
Russell vs. Ayres, 120 N. C., 180–189.
Gamble vs. McCrady, 75 N. C., 509.
Bank vs. Commissioners, 119 N. C., 214.

So far as now appears, the amendment locating the road into Wilkes county was validly passed, and became a valid law of North Carolina.

If section 13 had been originally enacted as it now reads as amended, it would seem clear that as when built this piece of road was declared to be the second division of said road, and as power was given to all counties " near or through which said railroad may pass " to subscribe for stock, that Wilkes county would be in the same category with Forsyth county, which is mentioned in the section locating the first division. Wilkes would be one of the counties through which the Second division of the road was authorized to be constructed, just as Forsyth was a county, into which, the First division of the road was to be built.

" Has the supreme court of North Carolina ever interpreted this amendment and declared its meaning? We do not find that it has.

"In *Commissioners vs. Call*, the majority opinion does not place the decision upon the contention that Wilkes county is not in the same category with Forsyth county, but upon *a want of power affecting both alike*, and upon the fact that an invalid enactment is recited on the face of the Wilkes County bonds as authority to issue them.

"The original charter ordinance of 1868, having given authority to construct a railroad by way of Salem and Winston, in Forsyth county, to some point on the northwestern boundary line of the State, and to construct branches, and the legislature having afterwards validly enacted that one of these branches running towards the northwestern boundary line of the State, to be called the Second division, should be constructed by way of Wilkes county, there would seem no sound reason for construing the legislation so as to deny to Wilkes county that power to issue bonds which the supreme court of North Carolina had in 1877 held that Forsyth county had."

Again, says Judge MORRIS:

"We think that Wilkes county when the bonds in suit were issued was in the same category with Forsyth county, and that the purchasers of the bonds had a right to rely and rest upon the decisions in the cases of *Hill vs. Commissioners* (1870), 67 N. C., 367, and *Belo vs. Commissioners* (1877), 76 N. C. 489, as to the power conferred by the ordinance of March 9, 1868, and that the different conclusion as to the power conferred by that ordinance arrived at and declared by a majority of the supreme court of North Carolina, long after the date of the issuing of the bonds in suit, cannot destroy the validity of the bonds in the hands of *bona fide* holders (*Loeb vs. Trustees*, 179 U. S., 472, 492; 21 Sup. Ct., 174, 45 L. Ed., 280.")

On page 35 of the record, in paragraph 8 of the complaint filed in the action in the State Court it is alleged that it is only Section 4 of the Act of 1879, chapter 43, providing for counties subscribing to the capital stock of the company, that is void. That part of the statute, providing for the *route of the road*, is valid, and so admitted to be in that complaint.

It is well settled that a part of an act may be constitutional and another part unconstitutional.

Again, the route of the road was not only determined by the Legislature, but by the county and also by the company. When the charter was passed, that is, the ordinance of 1868, a new person was brought into existence, known as the Northwestern North Carolina Railroad Company, and certain powers, franchises of the corporation, were conferred upon it.

When this power to subscribe to the capital stock of the company was conferred upon *Forsyth County* there was also a privilege conferred upon the *company.*

In the exercise of this privilege, if Wilkes was in the same category as Forsyth, the company assented to the route settled upon by the county, empowered to do so by the Legislature (see Printed Record, page 43, Ex. B. 42). "The above order," providing for the election and pointing out the route and the building of the road to Wilkesboro, "is made at the request of the North Western North Carolina Railroad Company, and with their full concurrence."

So that it appears that it was by the Legislature and the county, acting under and in accordance with the Act, and also by the company, in the exercise of its privilege conferred upon it by its charter, the ordinance of 1868, that route was settled.

In further consideration of the ordinance of the Convention of 1868, the charter of this railroad company, we see that it gave the power to build branches of the road in *any* direction, and we see that the statutes, relied on by the complainants, were amendments to the charter, and gave no *powers not already conferred by the charter itself upon the company and counties, towns and cities.*

We see, also, that the charter was granted in 1868,

before the Constitution went into effect, and the statutes printed in the record, and amendatory of the same, passed after the Constitution was adopted.

Here we ask a consideration of the case of the *County of Scotland vs. Thomas*, 94 U. S., 682.

On page 689 of the volume in that case, Justice BRADLEY says:

"The specific question in the present case, therefore, is whether the authority given to counties and towns in 1857, to subscribe to the capital stock of the Alexandria and Bloomfield R. R. Co., has become extinguished by the subsequent consolidation of that company with other companies, irrespective of the Constitutional provisions referred to."

Justice BRADLEY says, also, on page 688, after quoting the words of the Constitution of Missouri, similar to the words of the North Carolina Constitution of 1868, that "This prohibition, it will be observed, is against the Legislature's authorizing municipal subscriptions or aid to private corporations; *it does not purport to take away any authority already granted.*"

On page 693 Justice BRADLEY goes on to say: "But the case has other aspects, which it is necessary to take into consideration.

* * * * * *

"The project of the railroad promised a great public improvement, conducive to the interests of Alexandria and the counties through which it would pass." "The power was sought at the hands of the Legislature, and was given." "It was relied on by those who subscribed their private funds to the enterprise."

Speaking of this power, he says: "Why it should not still attach to this portion of the road as one of the rights and privileges belonging to it, into whose hands soever it comes, by consolidation or *otherwise*, it is difficult to see. * * * Subscription to the stock *was not only a power of the county, but a privilege of the company.*"

This is the view taken of this question, by BYNUM, Justice, in *Belo vs. Commissioners*, and FURCHES, Justice, in his dissenting opinion in *Commissioners vs. Call*, before referred to.

As we view the brief filed in this case, in support of the petition for *certiorari*, it seems to be substantially the same as that filed in the *Stanly case.*

In both, we observe that the counsel for the counties have not been able to find elsewhere than in our brief, and the opinion of Judge BOYD, the rule that the Court will uphold bonds, issued as these were, if, under any circumstances, it can do so.

We say here, as we did in our brief in the Stanly case, that the counsel could study the opinion of Justice BYNUM in the *Belo case* with profit, as also the opinion of Justice GRAY, in the case of *Louisville, etc., Railway Co. vs Louisville Trust Company*, 174 U. S., pages 573 and 574.

In the latter, says that Justice :

" In *Merchants' Bank vs. State Bank*, 10 Wall., 604, this court stated as an axiomatic principle in the law of corporations this proposition : ' Where a party deals with a corporation in good faith, the transaction is not *ultra vires*, and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists. If the contract can be valid under any circumstances, an innocent party in such case has a right to presume their existence, and the corporation is estopped to deny them.' 10 Wall., 644, 645. The proposition was supported by citations of many English and American cases, and among them *Royal British Bank vs. Turquand* (1856), 6 El. & Bl., 327. And the justices of this court, while differing among themselves in the application of the principle to municipal bonds, have always treated *Royal British Bank vs. Turquand* as well decided upon its facts. *Knox County vs. Aspinwall*, 21 Howard, 539, 545 ; *Moran vs. Miami County*, 2 Black, 722, 724 ; *Gelpecke vs. Dubuque*, 1 Wall, 175, 203 ; *St. Joseph vs. Rodgers*, 11 Wall, 644, 666 ; *Humboldt vs. Long*, 92 U. S., 642, 650. And see *Zabriskie vs. Cleveland, Columbus and Cincinnati Railroad*, 23 Howard, 381, above cited."

The cases cited by Justice GRAY in the above paragraph are decided upon *municipal bonds*, and show that the principle he states applies to contracts with municipal as well as with other corporations; and the late Justice MILLER, in his dissenting opinion in the case of *Humboldt Township vs. Long*, 92 U. S., pages 650 and 651, says, the case of *Knox County vs. Aspinwall*, 21 Howard, 539, the original case, on which the rule and principles are based, is itself based upon *The Royal British Bank vs. Turquand.*

Every case cited by Justice GRAY is a case upon municipal bonds.

Justice BYNUM, in *Belo vs. Commissioners*, says:

"While the decisions are very uniform that the record of the justice's court, affirming the fact of compliance with the conditions precedent to the subscription of stock is conclusive, and estops the county from denying the validity of the bonds in the hands of a *bona fide* holder before maturity, they are equally uniform in giving the same effect to the recitals in the bonds themselves, that they had been issued in pursuance of the law which authorized their issue. The recital is a determination of the question, and the holder has a right to rely on it. *Town of Coloma vs. Evans*, 92 U. S., 484. *Knox County vs. Aspinwall*, 21 Howard, 539. Mr. Justice GRAY says: 'In the leading case of Knox vs. Aspinwall, the decision was rested upon two grounds. One of them was that the mere issue of the bonds containing a recital that they were issued in pursuance of the legislative act was a sufficient basis for the assumption by the purchaser that the conditions on which the county was authorized to issue them had been complied with, and it was said the purchaser was not bound to look further for evidence of such compliance, though the recital did not affirm it. This position was supported by reference to the Royal British Bank vs. Turquand, 6 Ellis and Blackburn, in a case in the exchequer chamber, which fully sustains it."

The foregoing are the words of Justice BYNUM, in a decision which has never been departed from. Here

the Supreme Court, *in 1877*, approved of the doctrine in the Royal British Bank case, upon which *Knox vs. Aspinwall* was based.

We ask the Court, in view of this application for writ of *certiorari*, to consider the opinions of Judges MORRIS and BOYD, in support of their decree. They have carefully considered this case, as they did the *Stanly case*. This case has been, in one form and another, in Court for nearly four years. It has been considered by this Court, and it seems to us the question left open, to wit, whether the counties of Wilkes and Forsyth stand in the same category or not, a matter to be settled by the Circuit Court of Appeals, in its further proceedings, as directed by this Court, is one of fact more than law.

That Court has found that they did, both, stand alike, which seems to us to be an end of the case.

When this Court said that the only question in the case before it was whether the Wilkes County bonds now in suit were in the same category as the Forsyth County bonds, it meant to hold, and did hold that the ordinance of the Constitutional Convention was, *per se*, authority for issuing bonds, and needed no additional legislation to authorize such issue. That is a matter now no longer open to controversy, having been expressly decided by this Court. The only question left was whether Wilkes County was a county which was authorized to issue these bonds under the said ordinance ; and it was authorized to issue bonds under the said ordinance if it was a county "near or through which said railroad may pass." That it was such county was determined by the board that issued the bonds, and by a vote of the people, and by the construction of the road under such vote, in the county of Wilkes, said railroad being, as the record shows, the

only railroad that that county has to this day. The United States Circuit Court of Appeals held that Wilkes County was authorized to issue such bonds under the said ordinance, and properly so held. No other holding is possible under the facts shown in the record.

There are two distinct and independent sources of authority for the issue of these bonds of Wilkes County now in suit. One is the ordinance of the Constitutional Convention, to which I have confined the above discussion, the other is the Code, Sections 1996 to 2000, inclusive, which are discussed in the brief of associate counsel. Either of these authorities, as it exists, is sufficient, and one does not depend on the other, and each of these authorities was complied with in the issuance of these bonds.

Looking through the entire record, and seeing the good faith with which these bonds were issued, their sale and purchase, the completion of the railroad, in absolute performance of the contract, and the satisfaction of the public with the work, it does seem that there should be an end of this litigation.

CHARLES PRICE,
Of Counsel for Respondents.

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Supreme Court of the United States.

OCTOBER TERM, 1902.

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Clerk.

No. 247.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY and JOHN H. JOHNSON, Sheriff and *ex officio* Treasurer of Wilkes County,
Petitioners,

vs.

W. N. COLER & COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR RESPONDENTS.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
CHARLES PRICE,
Of Counsel.

C. C. BURGOYNE, Walker and Centre Streets, N. Y.

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There is no doubt that Wilkes County and Forsyth County are in the same category. This we now proceed to show 11

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Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 247.

The Board of Commissioners of Wilkes County and John H. Johnson, Sheriff and *ex officio* Treasurer of Wilkes County,
Petitioners,

vs.

W. N. Coler & Company,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR RESPONDENTS.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
CHARLES PRICE,
Of Counsel.

Statement of the Case.

This case was once before this Court on a certificate made by the Judges of the United States Circuit Court of Appeals for the Fourth Circuit, propounding to this Court certain questions for instructions to guide the said judges in their disposition of this case. The decision of this case in answer to the said questions is reported in *Wilkes County vs. Coler*, 180 U. S., 506.

A copy of the bonds in question is set forth in the Record (p. 16).

There was double lawful legislative authority for the issuance of these bonds, namely (A) the ordinance adopted by the Constitutional Convention of North Carolina, March 9, 1868, and (B) the separate and independent authority of Sections 1996 to 2000 of the Code of North Carolina. The bonds were issued in conformity to said ordinance, and were also issued in conformity to the said sections of the Code.

After the decision of this Court in *Wilkes County vs. Coler*, 180 U. S., 506, and after the case went back, the Circuit Court of Appeals rendered the opinions (Record, pp. 110, 118), and entered the judgment (Record, p. 123), which the petitioners for *certiorari* now seek to review. The Circuit Court of Appeals followed the decision of Court, and found that the principles laid down by this Court required a judgment in favor of the validity of the bonds in question, and the Court of Appeals puts its judgment solely upon the effect of the ordinance adopted by the Constitutional Convention, March 9, 1868, which is so fully discussed by this Court, and, doing so, the Circuit Court of Appeals found it unnecessary to con-

sider the other source of authority for the issue of these bonds—to wit, the Code, Sections 1996-2000.

By referring to the questions certified to this Court, and which were answered in the case of *Wilkes County vs. Coler, supra*, it will be seen that one of the cases referred to in the first question certified to this Court was as to the duty of the United States Court to follow the decision sf the Supreme Court of North Carolina in the case of *Wilkes County vs. Call* (123 N. C., 108, A. D. 1898). This Court held that it was not the duty of the Circuit Court of Appeals to follow that case so far as the ordinance of 1868 of the Constitutional Convention was concerned, basing this conclusion upon the *Belo case* (A. D. 1877) and the *Hill case* (1870), which had been decided years before by the same Supreme Court of North Carolina in respect of this very ordinance of 1868, but that it was its duty to follow the *Belo case* and the *Hill case.*

In the application for *certiorari* the petitioners attempt to re-discuss and to have brought again into review the effect of the said ordinance of the Constitutional Convention and the effect of the decision of the Supreme Court of North Carolina in the case of *Wilkes County against Call.*

The leading argument made by the petitioners' counsel for the writ of *certiorari* is based upon the misconception that there is necessarily involved in this record a conflict between the Circuit Court of Appeals and the Supreme Court of North Carolina. Not so.

If there is any conflict, it is between the *earlier* decisions of the North Carolina Supreme Court in the *Belo case* and *Hill case*, made before these bonds were issued, and the later decision of the same Court in the *Call case (Commissioners of Wilkes Co. vs. Call*, 123

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If there is any conflict between the decision of the Supreme Court of North Carolina in *Wilkes County vs. Call*, just cited, and the Federal Courts that conflict is not with the Circuit Court of Appeals, but with the Supreme Court of the United States, and with its decision in the case of *Wilkes County vs. Coler*, 180 U. S., 506.

These bonds were issued in the year 1889, in aid of the railroad into Wilkes county.

The railroad was constructed, and has been in operation ever since.

Interest was paid by the county upon these bonds for many years after their issuance, and the bonds are owned by *bona fide* holders who have paid full value therefor.

The words of Mr. Justice PECKHAM in *Tulare Irrigation District vs. Shepard*, 185 U. S., 1, are in point where he states (page 8):

"It is agreed in the statement of facts in this case that the moneys received from the sale of the bonds in suit were applied to building and constructing the irrigation works now in use by the defendant corporation. It has, therefore, received the full consideration for which the bonds were issued, has built its works with the proceeds, and uses such works for the purposes intended. Notwithstanding these facts, it now refuses to pay the bonds or the interest thereon, and, while acting as a corporation, at all times, still sets up that it was never legally organized, and hence had no legal right to issue any bonds.

"In the case of *Douglas County Commissioners v. Bolles*, 94 U. S., 104, 110, a case involving facts somewhat similar, this court said: 'Common honesty demands that a debt thus incurred should be paid.' That

sentiment has lost no force by the lapse of time, and we think it applies in its full strength to this case. Unless there be some settled rule of law which prevents a recovery in this action, the judgment under review should be affirmed."

In 1898, years after these bonds had been issued and sold, the Supreme Court of North Carolina, in the case of *Commissioners of Wilkes County vs. Call*, 123 N. C., 308, which was a simulated and collusive case, being brought by the Commissioners of Wilkes County against the treasurer of Wilkes county, rendered a decision by a bare majority, in which the county treasurer was enjoined from paying interest on these bonds. The record in the official report, 123 N. C., 308, states the counsel appearing as follows:

"Mr. *A. C. Avery* for plaintiffs; no counsel *contra*."

The answer of Call, the treasurer of Wilkes County, (the defendant in the case of *Commissioners of Wilkes County vs. Call*, 123 N. C., 308), which was filed in this present case in the United States Circuit Court (Record, page 79) states among other things:

"It was after this defendant's positive*ly* refusal to carry up said appeal that Welborn and Turner by some means unknown to this defendant became parties to said proceedings and the appeal by them was perfected and the case carried to the Supreme Court of North Carolina, and while Judge STARBUCK'S decision was affirmed, *the cost of said appeal was paid by Wilkes County*. That this defendant was Treasurer of Wilkes County for four years, and that he never heard of Welborn or Turner owning a bond until about the time they became parties to said suit."

The affidavit of L. C. JENNINGS, one of the County Commissioners of Wilkes County, in this case (Record, page 86), states among other things:

"The defendant Call appeared before the Board and advised them that it was their duty to pay off the bill

of costs against J. M. Turner and J. W. Welborn sent down by the Supreme Court, which he said that he had paid, relying on having it allowed in his settlement as retiring sheriff of the county, *and being inexperienced the Board confided in Call's representation as to their duty and credited him with the amount of said bills.*"

It thus appears that on Call's refusal to take an appeal to the Supreme Court of North Carolina, Welborn and Turner (who together became the joint owners of *one* bond after the suit was brought in the North Carolina State Court, see answer of J. M. Welborn and J. M. Turner, Record, page 69) took an appeal to the Supreme Court of North Carolina, and that the expenses of said Welborn and Turner in taking such appeal, and the costs against them awarded by the Supreme Court of North Carolina, were paid by the County of Wilkes.

FURCHES, Chief Justice, with whom concurred FAIRCLOTH, late Chief Justice, N. C., says (123 N. C., 336):

"The Court, in its opinion, says that certain positions were strenuously insisted on by the defendants. I think this must be a mistake, as this case was not argued before us, either by brief or by oral argument on behalf of the defendants. Mr. Turner and Mr. Wellborn, by leave of the Court, made themselves parties defendant after the action was brought, but they have given the case no further attention. Why they did this I do not know. * * * But, as to the conduct of the case before this Court, it has been unilateral."

Justice DOUGLAS, in his opinion, *Commissioners vs. Call*, 123 N. C., 308, concerning these Wilkes County bonds, said:

"The bondholders themselves *could* have become parties to any such proceedings, and *would* have been gladly heard by us, but the mere fact that *they deliberately refrained from any participation in the defense*," etc., etc.

The learned Justice thus shows *that he did not believe*, from the record, that Turner and Wellborn were *bona fide* holders of even *one* bond, or, that they actually participated in the defense of the case in the State Court.

The truth is (although the counsel for plaintiffs did not call the attention of the Court to the fact), the case was before the Court, erroneously, because the time in which the appeal was to be perfected, had expired, before Turner and Wellborn were made parties (Record, pp. 69-72).

After the decision of the Supreme Court of North Carolina, in the said case of *Wilkes County Commissioners vs. Call*, 123 N. C., 308, this same Turner and Wellborn, whose expenses and costs in the Supreme Court of North Carolina were paid by the County of Wilkes, undertook to sue out a writ of error bringing that case to the Supreme Court of the United States, and the case came before this Court as *Turner vs. Wilkes County Commissioners*, 173 U. S., 461, and this Court, of course, promptly dismissed the writ of error because no Federal question was involved.

It is this decision of the North Carolina Supreme Court, in this one-sided case, with counsel only on one side, and rendered by a bare majority of the court, which the learned counsel for the county—the same learned counsel that appeared in the Supreme Court of North Carolina in that case—now claims is binding as an authority upon the United States courts in this action brought by the bondholders for the interest on their bonds. The proposition is monstrous. The bondholders who now have brought this action in the United States courts were not represented in the Supreme Court of North Carolina, nor was any other

bondholder represented there. No arguments were made on behalf of the bondholders there. It does not appear but that if bondholders had been present, and if counsel had represented them, and presented arguments to the Court, that Court would have decided precisely as did the United States Circuit Court of Appeals in the present case. Indeed, we think it is clear, and that this Court also will see from the opinions of Judges MORRIS and BOYD and from our brief, that upon the presentation of the case for the bondholders only one conclusion can possibly be reached, namely, that these bonds are valid and enforceable against the County of Wilkes.

The question presented on this writ of *certiorari* is very short: Is the decision of the Circuit Court of Appeals right? If it is, that ends the controversy, and without reference to the decision of the collusive and simulated case of *Commissioners of Wilkes County vs. Call*, 123 N. C., 308.

For the convenience of the Court we have printed in an APPENDIX at the end of this brief various provisions of the Constitution of North Carolina, the ordinance of the Constitutional Convention, and Statutes of North Carolina, which this Court may desire to refer to or examine in connection with this case, and give references to places in the record, where the statutes not here reprinted may be found printed in full.

Argument.

INTRODUCTORY STATEMENT.

This case comes for argument upon the whole record. Of course the answers by the Supreme Court of the

United States to the certified questions have settled the propositions or questions covered thereby.

The Court gave limited answers to the questions, in substance, as follows (180 U. S., 506; and present Record, p. 109):

"1. That the Circuit Court should have regarded the decisions set out in the questions as controlling upon the inquiry, whether the legislative enactments of 1868, 1879 and 1881 were passed in such manner as to become, under the Constitution, laws of the State.

"2. That the rights of the parties in this case are determinable by the law of the State, as it was declared by the State Court to be at the time the bonds here involved were made in the name of the County and put upon the market."

We have read carefully the opinion of this Court, delivered by Mr. Justice HARLAN, in *Wilkes County vs. Coler*, 180 U. S., 506. The Court answers the questions only to a certain extent, but not fully as certified, and is careful so to state (see p. 533). We understand that the opinion and the answers given to the questions reserved from their operation and effect the question whether the Convention ordinance of March 9, 1868, did not itself, aside from and independent of the legislation of 1868, 1879 and 1881, give full power and authority to Wilkes County to issue the bonds in question.

This Court distinctly stated that the said ordinance of March 9, 1868, was valid, and was in force after the Constitution was adopted, and that the Supreme Court of North Carolina had so held in the Hill and Belo cases with respect to Forsyth County bonds.

This settles the objection so much urged on the other side, based on certain decisions or dicta of the Supreme Court of North Carolina, all made long after these bonds were issued, that all unexecuted powers to take stock in railroads and issue bonds were annulled by the Constitution when it went into effect. Mr. Justice HARLAN expressly stated that the *Belo* case held that the said ordinance of March 9, 1868, conferred the authority upon *Forsyth County* to make the subscription, and that this was so independently of the act of August, 1868, or of any other legislation (p. 529).

The learned Justice says at page 529:

"Forsyth County—whose liability on the bonds in suit in that case was directly involved—made the point that it had no authority to issue such bonds. The court, however, held that such authority was conferred by the Convention ordinance of March 9, 1868, and the subscription and bonds made in the name of that county to the North Western North Carolina Railroad Company were upheld as valid *under that ordinance*, which was recognized as part of the law of the State and as conferring authority on the county of Forsyth to do what it did.

"It results that when the bonds here in question were issued in 1889, it was the law of North Carolina that the ordinance of 1868, constituting the charter of the North Western North Carolina Railroad Company, was not superseded by the constitution of 1868, but was *in force* and therefore gave power to counties *embraced by its provisions* to take stock in that company and pay for it in county bonds, just as Forsyth County had done."

As to *Wilkes county*, Justice HARLAN states the question to be as follows, to wit (p. 529):

"Whether Wilkes county was so situated with reference to the contemplated road that it could be said to have had the same authority as was given to Forsyth county,"

which question he states "is not now decided." On page 532 he says:

"Was Wilkes county in the same category with Forsyth county?"

In short, if Wilkes County is in the same category with Forsyth County, then it stands decided by the Supreme Court of the United States that the said Ordinance of March 9, 1868, does, *per se*, give to Wilkes County the authority to issue the bonds in question, irrespective of the legislation of 1868, 1879 and 1881, so that the only question under said ordinance now is whether Wilkes County is in the same category with Forsyth County. If so, then the answer of the Supreme Court to the second question applies, which is that the rights of the parties in the Wilkes County case are determinable by the law of the State as it was decided by the State Court to be at the time when the Wilkes County bonds were put upon the market. It results, therefore, that, if Wilkes County is in the same category with Forsyth County, the question is conclusively decided in our favor by the former opinion of the Supreme Court of the United States in the present case, without anything more, and the Circuit Court of Appeals committed no error in affirming the judgment of the Circuit Court in this, the Wilkes County, case.

There is no doubt that Wilkes County and Forsyth County are in the same category. This we now proceed to show.

I.

The ordinance enacted by the Constitutional Convention of the State of North Carolina, March 9, 1868, entitled "An Ordinance to incorporate the Northwestern North Carolina Railroad Company," gave per se, clear and complete authority to issue the bonds in question, and that said ordinance gave such authority was twice expressly decided by the Supreme Court of North Carolina before the said bonds were issued.

The Constitutional Convention of the State of North Carolina enacted an ordinance to incorporate the Northwestern North Carolina Railroad Company, ratified March 9, 1868, printed in the record in this case, pages 10–13. This ordinance provided in Section One:

"That, for the purpose of constructing a railroad of one or more tracks, from some point on the North Carolina Railroad, between the town of Greensboro, in Guilford County, and the town of Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county, to some point in the northwestern boundary line of the State, to be hereafter determined, a company is hereby incorporated under the name and style of the Northwestern North Carolina Railroad Company, with a capital stock of two millions of dollars, which shall have a corporate existence as a body politic for the space of ninety-nine years," etc.

Section 2 of the said ordinance provided:

"Be it further ordained, That **the capital stock of said company may be created by subscriptions on the part of** individuals, corporations **and counties**, in shares of one hundred dollars."

Section 12 of said ordinance provided :

" Be it further ordained, That the stockholders of said company may pay the stock subscribed by them either in money, labor or material for constructing said road, as the board of directors may determine, **and that all counties or towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company, for the government of such towns and counties as are now allowed to subscribe to the capital stock of said company.**"

" The act incorporating the North Carolina and Atlantic Railroad Company," referred to in the said Section 12 of the said ordinance, is the act, Chapter 136, of the Laws of North Carolina, session of 1852, Sections 33 to 37 of which are printed in the record (pp. 54, 55), and said Sections 33 to 37 are by such reference adopted and made part of said ordinance. These sections there quoted are the only material and pertinent sections of the said act of 1852, and are the only sections thereof which relate to county or municipal subscriptions.

Section 33 of the said Act of 1852 provides :

" It shall be lawful for **any incorporated town or county, near or through which said railroad may pass,** to subscribe for such an amount of stock in said company as they shall be authorized to do by the inhabitants of said town or the citizens of said county, in manner and form as hereinafter provided " (Record, p. 54).

The language of Section 2 of the ordinance above quoted includes Wilkes County—that " the capital stock of said company may be created by subscriptions on the part of individuals, corporations and *counties.*"

So also the language of Section 12 of said ordinance includes Wilkes County—"*all* counties or towns subscribing stock." The said Section 2 and the said Section 12, if standing alone, would clearly include counties generally, and, among them, Wilkes County. The said Section 33 of the Act of 1852 provides that "it shall be lawful for *any incorporated town or county near or through which said railroad may pass.*" If this operates in any way to restrict the otherwise general language of the said Sections 2 and 12 in the ordinance of 1868, it is, nevertheless, perfectly clear that the County of Wilkes is embraced within the language of said Section 33.

A glance at the map of the State of North Carolina shows that a railroad constructed on the route described in the Convention ordinance of March 9, 1868, namely, "from some point on the North Carolina Railroad between the town of Greensboro, in Guilford county, and the town of Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county, to some point on the northwestern boundary line of the state," must necessarily pass "near or through" Wilkes County.

The demonstration, therefore, is complete, that the said ordinance of the Constitutional Convention of March 9, 1868 expressly authorized the county of Wilkes to subscribe for stock in the said railroad company. It is also perfectly clear that the said county of Wilkes was authorized by the said ordinance of 1868, and by the said act of 1852, which was referred to in Section 12 of said ordinance, to issue under the sanction of a popular vote, bonds of the county in payment of such

subscription to said stock. Section 34 of the said act of 1852 provides that the justices of peace of the county may make an order for an election of the qualified voters of the county. Section 35 of said act of 1852 expressly provides for the issue of county bonds:

"That if, upon the return of such constable and of such sheriff, it shall appear that a majority of the qualified voters of such town, and by the return of the sheriff that a majority of the qualified voters of such county, voting upon the question, are in favor of the subscription, the corporate authorities of such town **and the justices of such county shall appoint an agent to make the subscription in behalf of such town and county, to be paid for in the bonds of such town and county, and on such time as shall be agreed on by said town officers and the justices of said county**" (Record, p. 54).

The language of Section 12 of the said ordinance (quoted *supra*,) is "that all counties or towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company." The method of making the subscription, the method of paying such subscription—namely, in the bonds of such county—and all the other things in the said act of 1852 relating to the method of making the said subscription and paying the said subscription are, by this reference, incorporated into, and are a part of, the said ordinance of 1868. The method of paying said subscription—namely, by the bonds of the county—is as much a part of the said ordinance as are the other provisions of the act of 1852 in regard to the making of the said subscription. It was so held, prior to the issue of the bonds now in suit, by the Supreme Court

of North Carolina in the two *Forsyth County cases* of *Hill* and *Belo* below fully stated. *No other method of paying the said subscription is provided for, either in the said ordinance or in the said act of 1852.* Such a construction must be placed upon the ordinance and act as will render them effective and not nugatory.

The bonds in suit were duly authorized by a vote of a majority of the qualified voters of Wilkes County. This is admitted on the record.

THE SAID BONDS now in controversy recite that they are

" authorized by a vote of a majority of the qualified voters of Wilkes county, by an election regularly held for that purpose on the sixth day of November, A. D. 1889, and by an order of the Board of Commissioners of Wilkes county [the said Board of Commissioners having conferred upon them, under the constitution of 1868 and the code of North Carolina, the same power which the justices of the peace formerly had] made on the first day of April, A. D. 1889. This series of bonds is issued to pay the subscription of $100,000 made to the capital stock of the Northwestern North Carolina Railroad Company by said county of Wilkes " (Record p. 16).

THE COMPLAINT in the present case alleges (Record, p. 7, paragraph 22):

" That the county of Wilkes, acting through its Board of Commissioners, and in accordance with the ordinance and acts as above set out, subscribed the sum of $100,000 to the capital stock of the Northwestern North Carolina Railroad Company, a proposition to subscribe the said amount having been submitted to the qualified voters of the county at an election held according to law, and a large majority of the said qualified voters having voted in favor of the same."

THE ANSWER of the county commissioners (Record, p. 27, paragraph 22) avers:

"These respondents, still denying the authority of the former commissioners to issue bonds or subscribe to the capital stock of the said company, admited that they did subscribe and issue bonds in the amounts alleged in the complaint, and that it was ascertained and declared that a majority of the qualified voters of Wilkes county had voted in favor of making such subscription, and that it is now too late to question said finding as to said vote."

The Railroad was actually constructed in Wilkes County. This is admitted on the record.

It is also stated in the complaint (Record, p. 7, paragraph 23) that the said railroad was constructed in the said county of Wilkes, "and is the only one running within the limits of the county, and has been taxed by the county each and every year since its construction." The answer of the county commissioners (Record, p. 33, paragraph 27) also *admits the completion of the said railroad to Wilkesboro, in the said county of Wilkes.*

We have thus shown that even if this were an original proposition, which had never been passed upon by the Supreme Court of North Carolina, the said ordinance of 1868, standing by itself alone, was and is, *per se*, sufficient authority for the issue of these bonds of Wilkes county. It is not pretended or alleged by anybody that there is any act of the legis-

lature repealing, or attempting to repeal, the said ordinance.

But we do not need to depend upon showing the correctness of this proposition as an original question. The point has been expressly adjudged by the Supreme Court of North Carolina in two cases, decided respectively in 1870 and 1877, known as the Hill and Belo cases, and these cases are conclusive in favor of the proposition that the said ordinance of 1868 was not repealed or affected by the constitution and that said ordinance gave, per se, lawful authority to issue county railroad aid bonds, and the Supreme Court of the United States so holds (180 U. S., 506, *supra*).

Hill vs. Commissioners of Forsyth County, 67 N. C., 367 (June Term, 1870).

Belo vs. Commissioners of Forsyth County, 76 N. C., 489 (January Term, 1877).

The Original Convention Ordinance of March 9, 1868, authorized the railroad in Wilkes County in aid of which the bonds were voted, independently of the Act of February 20, 1879.

RE MAIN LINE AND BRANCHES.

We understand the learned counsel for the Wilkes County to argue that the particular railroad constructed in Wilkes County, in respect of which the bonds in question in the present case were issued, was a **new**

branch line, and was not authorized until the passage of the act of February 20, 1879. [The said act is reprinted in the Record, page 14.] In making this argument, however, the learned counsel is clearly mistaken in his facts. The language of Section 1 of said ordinance of March 9, 1868, printed in the Record in this case, page 10, is

"a railroad of one or more tracks from some point on the North Carolina Railroad, between the town of Greensboro, in Guilford county, and the town of Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county, *to some point in the northwestern boundary line* of the state, to be hereafter determined, a company is hereby incorporated," etc.

Now, a glance at the map of the State of North Carolina shows that such a railroad to the "northwestern boundary line of the state" **must necessarily pass "near or through" Wilkes county.** The northwestern boundary line of the State is the line which is reached by going in a northwesterly direction "from some point on the North Carolina Railroad, between the town of Greensboro, in Guilford County, and the town of Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county." This is the **main line** of the railroad as contemplated by the said ordinance of March 9, 1868; and that railroad, in respect of which the bonds were issued in the present case, is a part of such main line of railroad. It is true that the said road has not been constructed, we believe, beyond the town of Wilkesboro, in Wilkes County, and that the point on the northwestern boundary line of the State has not yet been determined, as indeed it has not been necessary to determine it, because the railroad has not yet reached, or approached near to that boundary

line, and the said ordinance did not prescribe any limit of time within which the said road should be constructed to the said northwestern boundary line.

When Section 1 of the said ordinance said the "*northwestern* boundary line of the state," it meant precisely what it said. It did not mean the *northern* boundary line of the State, to which the learned counsel for the appellants pointed in his former oral argument of this case in the United States Supreme Court. Not only is this obvious from reading this express language of Section 1 of the ordinance, but it is also further obvious from the language of Section 13 of the said ordinance (Record, p. 13), as follows, to wit:

"Be it further ordained, That the company shall have power to construct branches of said road, one of which shall run from the towns of Winston and Salem by way of Mount Airy, in Surry county, to the line of the State of Virginia."

When, therefore, the Constitutional Convention meant the *northern* boundary line of the State, to wit, the line of the State of Virginia, it said so, and described the line as "the line of the State of Virginia," which is a wholly different thing from the *northwestern* boundary line of the State mentioned in Section 1 of the said ordinance.

Furthermore, the topography of the country is such that the line of railroad described in Section 1 of the said ordinance, to wit, "a railroad of one or more tracks from some point on the North Carolina Railroad, between the town of Greensboro in Guilford county, and the town of Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county, to some point in the northwestern boundary line of the state" must necessarily pass "*near or through*"

Wilkes County. Such a road would naturally run up the valley of the Yadkin river through Wilkes county. This is the only natural and practicable route, and was the one intended and prescribed by the said ordinance of March 9, 1868. On either side of this Yadkin valley are high hills and mountains, and this Yadkin valley forms the natural and only proper route for a railroad from the points mentioned to the northwestern boundary line of the state. In view of these facts of physical geography, well known to the Constitutional Convention which enacted the ordinance, this Section 1 is in reality as specific as if the said Convention had prescribed in express terms that this road should go up the Yadkin valley through Wilkes county, mentioning that county by name.

But, in any view, the road must necessarily run "*near or through*" *Wilkes county*, and that is the material thing, and the only material thing.

But in order to hold that the said ordinance of March 9, 1898, authorized the construction of the railroad in Wilkes county, and the issue of the bonds in question in respect thereof, **it is not necessary that the said line of railroad in Wilkes county shall be deemed a part of the main line** of the same road, although it clearly was part of the main line. Section 13 of the said ordinance above quoted provides (Record, p. 13):

"That the company shall have power to construct *branches of said road*, one of which shall run from the towns of Winston and Salem by way of Mount Airy, in Surrey county, to the line of the State of Virginia."

The road in question is not a branch which runs from Winston and Salem by way of Mount Airy, but that was only one of the branches which the said Sec-

tion 13 authorized the said company to construct. It was also authorized by said Section 13 to construct other branches. Even if the said railroad in Wilkes county is to be regarded as a branch of said railroad (although, as we have shown above, it is to be regarded not as a branch, but as main line), yet these bonds now in question were properly authorized by the said ordinance to aid in the construction of such branch.

The railroad in question is not a "branch," but a part of the "main line" originally authorized by the Ordinance of the Constitutional Convention passed March 9, 1868, but even if it were a "branch" the road was authorized and the bonds are valid.

RE ACT OF FEBRUARY 20, 1879.

It is argued by the learned counsel for the county that the act of February 20, 1879 (reprinted in Record at p. 14), was the first authority for the construction of this railroad in Wilkes county, in aid of which the bonds in question were issued. The learned counsel says that the act of 1879 amends Section 13 of the original charter by adding the words

"and one of which [branches] shall be constructed from the town of Winston and Salem, up the Valley of the Yadkin, by way of Jonesville and Wilkesboro, in the county of Wilkes, to Patterson's factory in the county of Caldwell, which branch shall be known as second division" (Rec., p. 14).

The learned counsel in one breadth argues that this act of February 20, 1879, is totally invalid, because

the ayes and noes do not appear on the House journal in the second reading, and in the next breath he argues that this railroad in Wilkes county is a *new* road, and was not authorized by the ordinance of March 9, 1868, because this act of 1879 speaks of this road as a branch. In other words, the learned counsel for the county is arguing that this Act of 1879 (although according to his contention it is *totally* invalid —we show later on that it is *not totally* invalid) is to be held valid so far as making this railroad in Wilkes County a "branch" line and not a part of the main line, although it would be a part of the main line if this Act of 1879 had not been passed. It is a little difficult, to say the least, to see how, if this Act of 1879 is *totally* invalid, it can possibly have any effect to convert what would otherwise be a part of the main line of railroad into a "branch." **But, even so, it would still be "railroad" and would run "near or through" Wilkes County, as much so if called a "branch" as if called "main" line.** The law deals with things, and not mere names, given by an invalid act, even if the Act of February 20, 1879 were invalid throughout.

There is no magic in the name "branch," and it is immaterial in the construction of the ordinance of March 9, 1868, whether the act of February 20, 1879, passed ten years afterwards, and by a different body of men, speaks of this road as a "branch." The real question is whether this railroad was authorized by the ordinance of March 9, 1868, be it called a "branch" or "main line." As to this fact there can be no possible question.

Even if this railroad constructed in Wilkes County is a branch, it was authorized by Section 13 of the

original ordinance, although said Section 13 of the original ordinance did not make it mandatory upon the railroad to construct the same, this *mandatory* provision being first inserted in the Act of February 20, 1879, and even if this railroad in Wilkes County were to be called a "branch," it was, nevertheless, authorized by the said convention ordinance of March 9, 1868, and that ordinance authorized the issue of bonds to aid in the construction thereof.

The power to issue bonds was conferred upon any county "near or through which said railroad may pass." This power was given whether the said railroad was what is called "main line" or "branch."

The language of the act is "near or through which *said railroad* may pass"—that is, whether the said railroad be what may be called main line or branch, the power was expressly given by said section 13 of the ordinance to construct branches—and even if this railroad into Wilkes County were to be regarded as a branch under the said ordinance of 1868 (and clearly it should not be), still there was clear power for Wilkes County under the said ordinance to issue said bonds, for this was, in any view, a "railroad" of said company, which passed "near or through" Wilkes County. On no theory can it be urged that what runs into Wilkes County is not "railroad," and railroad of the Northwestern North Carolina Railroad Company, and this railroad passes "near or through" Wilkes County, and, therefore, the said County of Wilkes was expressly authorized by the said ordinance to issue the bonds now in question, and this is so whether

the said railroad be called a branch, under Section 13 of the said ordinance, or whether it may be regarded as main line.

The learned counsel for the county seeks to argue that because the Act of February 20, 1879 (if the journals had shown that it was properly enacted by the Legislature), undertook to authorize the construction of the railroad into Wilkes County and the issue of bonds by the county in aid thereof, therefore, the said ordinance of 1868 had not authorized the said railroad nor the issue bonds. A more complete *non sequitur* it would be hard to find.

It frequently happens that out of abundant and extra caution a second act is passed, which undertakes to confer an authority which has already been given by a preceding enactment. The question whether or not such second enactment confers the authority is wholly immaterial as affecting the question whether the first enactment conferred the authority. Especially is this true when the second enactment was passed by a different body of men in the Legislature, more than ten years after the original enactment. This second body of men obviously had no right or power or authority to determine in 1879 whether the ordinance of 1868 conferred the authority or not, and, as a practical matter, the Act of 1879 was, of course, passed by the Legislature without any definite or careful consideration of the question whether or not the authority already existed.

A similar second authority was attempted to be conferred in the case of the bonds of Forsyth County, in question in the *Hill* and *Belo* cases, above cited, in respect of which the Legislature passed a second act—namely, the act passed the 11th of August, 1868,

which second act undertook to ratify and approve the issue of the said Forsyth County bonds. The Supreme Court of North Carolina, however, held that the original ordinance authorized the issue of the said bonds, and so, also, the Supreme Court of the United States in the present case (180 U. S., 506) decided that the Supreme Court of North Carolina thus held, and that this ordinance authorized the issue of the county railroad aid bonds independently of the said second act of August 11, 1868.

The precise question is whether the ordinance of 1868 authorized the construction of a railroad by the Northwestern North Carolina Railroad Company "near or through" Wilkes County.

What may or may not have been authorized by the act of February 20, 1879, is wholly immaterial to this question, for, if the ordinance of 1868 authorized the construction of a railroad "near or through" Wilkes county, then the said ordinance also gave authority to Wilkes county to issue county bonds to aid in the construction of such railroad. The language of Section 1 of the ordinance is (Record, p. 10):

"A railroad of one or more tracks, from some point on the North Carolina Railroad, between the town of Greensboro, in Guilford county, and the town of Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county to some point in the northwestern boundary line of the State, to be hereafter determined," etc.

There can be no doubt whatever that a railroad running from the initial point on the North Carolina railroad, by way of Salem and Winston, "to some point on the northwestern boundary line of the State," is such a railroad; that is, is a railroad authorized by the said ordinance.

It was not necessary to have any legislation such as that attempted in said act of February 20, 1879, in order to determine the route of the railroad or to permit the railroad company to construct its railroad "near or through" Wilkes County. The ordinance of 1868 was complete without any aid whatever from said act of February 20, 1879.

RE ROUTE OF RAILROAD AND ITS DETERMINATION.

This language of said Section 1, above quoted, of said ordinance, leaves to be determined only the "POINT *in the northwestern boundary line of the State.*" The learned counsel for the appellants attempts to argue as if the said ordinance had prescribed that the *route* of the said railroad should be hereafter determined before the railroad could be constructed through Wilkes county. There is no such language in the said ordinance. The only thing that is to be hereafter determined is the "point in the northwestern boundary line of the state," to which the said road shall run. That point has never yet been determined. The learned counsel for the county argues as if the said act of February 20, 1879, was an act which had been passed to determine something which was by said ordinance expressly required to be hereafter determined before the railroad could be constructed through Wilkes county. The act of February 20, 1879, does no such thing. It does not determine the "point in the northwestern boundary line of the state" to which the said road shall run.

The words in the said Section 1, "to be hereafter determined," may mean either

that the company is to determine such point or that the legislative body of the State is to determine it.

It is immaterial for the purposes of this case, by which one the determination is to be made. It would be a sound and proper construction of said words to hold that such determination is to be made by the railroad company and not by any legislative body. Such holding would be in harmony with the express provision of Section 5, which is (Record, p. 11):

> "That after the organization of said company and the election of a president and other necessary officers, the officers so elected shall proceed under the advice of the directors to locate the eastern terminus of the Northwestern North Carolina Railroad," etc.

In other words, this Section 5 gave the company the right to locate the *eastern* terminus of the road at "some point on the North Carolina Railroad between the town of Greensboro, in Guilford County, and the town of Lexington, in Davidson County" (see section 1). There would be nothing strange or inconsistent with the scheme of the ordinance if it were to be held that the "point in the northwestern boundary line of the state, to be hereafter determined," was likewise to be determined *by the company itself*. On the contrary, it is the natural construction and conformable to the general practice that the company determines matters of this nature unless it is otherwise specifically provided. Suppose, however, the words "to be hereafter determined" mean that the Legislature of the State should designate a point in the northwestern boundary line of the State to which the road should run. Then the road already constructed through Wilkes County can be continued to such point as shall be so designated by the

Legislature. This road would then be a road exactly within the description of the said Section 1 of the said ordinance, for it would be a road from the initial point, "running by way of Salem and Winston, in Forsyth County, to some point in the northwestern boundary line of the state," to a point which had been determined by the legislative body—if the determination must be made by the legislative body.

Route Is Not Left to be Hereafter Determined.

The intervening *route* between Salem and Winston and the "point in the northwestern boundary line of the state" is not in any way required to be "hereafter" determined by the legislative body. Such *route*, or at least such route for a distance which will make said road run "near or through" Wilkes County, is left open to be determined by the company.

The learned counsel for the county, however, undertakes to argue as if the railroad company must wait until the "point in the northwestern boundary line of the state" has been determined by the legislature, or until a route has been determined, before the company proceeds to construct any part of its railroad "near or through" Wilkes County. In support of such argument he urges that some point in the northwestern boundary line of the State might be designated by the Legislature which would make the route through Wilkes County not the shortest route to such point in the northwestern boundary line of the State. This fact, however, that the route through Wilkes County might not in such an event be the shortest line is clearly immaterial. But a glance at the map shows

that such route would in fact be the shortest practicable route.

But suppose that the argument of the learned counsel for the county be true, and that it is necessary for such road to go by way of the shortest route, still Wilkes County would be a county "*near or through*" which the said railroad *must* run. A glance at a map showing the geography of the country makes this conclusion inevitable. We respectfully ask the Court to look at any standard and official map of the State of North Carolina, and of the region mentioned in the said ordinance, and we respectfully call the attention of this Court to the fact that whichever way a railroad may run "by way of Salem and Winston, in Forsyth County," to some "point in the northwestern boundary line of the state," such railroad *must run* "*near or through*" *Wilkes County*. The railroad company was, therefore, beyond any question, expressly authorized by the said ordinance of 1868 to construct the said railroad "near or through" Wilkes County, and the said county was by the said ordinance expressly authorized to issue the bonds now in question.

The definite location of the route of this railroad where it has been constructed into Wilkes County has been assented to by all the parties interested: (1) The Railroad Company, (2) the County of Wilkes and (3) the State of North Carolina.

The definite location (1) was made by the *Railroad Company;* (2) it was assented to by the *County of*

Wilkes, for in the order calling the election to vote on the question of issuing the bonds of Wilkes County (Record, page 38), and in the order of the County Commissioners making the subscription (Record, page 40), and in the contract with the Railroad Company (Record, page 42), and in the order issuing the Wilkes County bonds now in question (Record, page 44), this definite route of the road is distinctly set forth. The county, therefore, is estopped from objecting that this definite route of the road in Wilkes County is not authorized. (3) *The State of North Carolina*, which alone could question the authority to make this definite location of the route, has never questioned this location in the least. No *quo warranto* has ever been brought by the State to compel the company to remove its road. Furthermore, the action taken by the State in the first section of the Act of February 20, 1879, which section is clearly valid under the North Carolina Constitution, shows that the State expressly assented to the construction of the road in the place where it was thus definitely located and actually constructed and put in operation.

In *Tulare Irrigation District vs. Shepard*, 185 U. S., 1, this Court held that even if the irrigation district there in question was only a *de facto* corporation, that neither the district itself nor any taxpayer in the district could question the validity of the bonds on that ground, that the State only could question the corporate existence of the district in *quo warranto* proceedings. So, here it is obvious that the County of Wilkes, having assented to the location of the road, and having voted bonds in aid of the company whose road was thus to be constructed, and was actually constructed, could not for one moment be heard in this Court or

any other to allege that the definite location of the road was not authorized. The State alone in *quo warranto* proceedings against the Railroad Company could make any such question, and even the State would not be successful in any such attempt, because the charter of the company clearly gave it authority to locate and construct the road where it was located and constructed and where it has ever since been and is now in full operation. It is, in fact, as appears in the record, the only railroad, which down to the present, is in existence in the County of Wilkes.

Neither further legislation making a definite location of the route of the railroad nor the determination of "the point in the northwestern boundary line of the state" is made a condition precedent to a subscription by the county to the capital stock of the railroad company nor the issuing of bonds in payment of such subscription. Inasmuch as Wilkes County is a county "near or through" which the railroad must run in order to reach a "point in the northwestern boundary line of the state," Wilkes County was by the ordinance authorized to make a subscription to the capital stock of this railroad company and to issue its bonds in payment of such subscription, the only condition precedent being a vote of a majority of the qualified voters, which vote was had.

FIXING THE POINT OF TERMINUS ON NORTHWESTERN BOUNDARY LINE OF THE STATE NOT A CONDITION PRECEDENT TO VOTING AID BY WILKES COUNTY.

The learned counsel for the county has attempted to argue as if some further statute was necessary after the ordinance of 1868 before Wilkes County could subscribe to the stock of the railroad company or issue its bonds in payment of such subscription. The learned counsel seems to argue that some further legislation is necessary *definitely locating the route* of the railroad "near or through" Wilkes County or *definitely fixing the "point* in the northwestern boundary line of the state." Any such view is clearly erroneus. There is not one word in the ordinance of 1868 to support any such view. No language in that ordinance requires any further legislation definitely locating the route of the road, or further legislation locating it at all, generally or definitely. But even if it did, no language of the ordinance makes any such thing a *condition precedent* to the subscription to the capital stock or to the construction of the road. The general route of the road is located by the ordinance itself as follows:

"From some point on the North Carolina Railroad between the town of Greensboro in Guilford County, and the Town of Lexington in Davidson County, running by way of Salem and Winston in Forsyth County, to some point on the northwestern boundary line of the state, to be hereafter determined."

A glance at the map shows that this railroad MUST run "*near or through*" Wilkes County, *whatever point in the northwestern boundary line of the State is hereafter determined* as the terminus of the railroad. There can be no escape, therefore, from the conclusion that Wilkes County was a county authorized under this ordinance and under Sections 33, 34 and 35 of the Act of 1852 therein referred to and above quoted, to subscribe to the capital stock of this railroad company and to issue

bonds in payment of such subscription. No condition precedent whatever is prescribed by said ordinance and said Act of 1852, except only an election by a majority vote of the qualified voters of the county. If it had been intended in the said ordinance or in the said Act of 1852 to make it a condition precedent to any county "near or through" which said railroad might run subscribing to the capital stock of the railroad company or issuing bonds in payment of such subscription that the line of the road be first definitely located by some subsequent act of the legislature, then it would have been easy to insert some provision to that effect in the ordinance or in the Act of 1852. No such provision was inserted and no such provision can be read into the ordinance or the Act.

There is in said ordinance, it is true, the following language: "to some point in the northwestern boundary line of the State, to be hereafter determined;" but **not even the determination of this point in the northwestern boundary line of the State is made a condition precedent to the subscription of the county to the stock of the railroad company or to the issuance of bonds of the county in payment of such subscription.** The authority to subscribe for such stock and to pay such subscription in bonds of the county, on vote of the qualified voters of the county being had, is conferred in ample terms and without any condition precedent whatsoever. It is true that the county must be one near or through which the railroad may pass, but Wilkes County clearly is such a county.

Furthermore, this was the common understanding and practical construction of this act, for not even the

Act of February 20, 1879, whether it be void or whether it be valid, in whole or in part, nor any other statute, void or valid, undertakes in any way whatsoever to determine the "point in the northwestern boundary line of the state."

The determination of such point in the northwestern boundary line of the State was, therefore, not a condition precedent to the subscription by the county to the capital stock of the railroad company nor to the issuance of bonds in payment of such subscription, and it was not understood to be such condition precedent by anybody who had anything to do with the Ordinance of 1868, or with the Act of February 20, 1879, or with the construction of the railroad, or with the taking of the vote of the qualified electors of the county, or with the issuing of the bonds in payment of the capital stock subscribed by the county. It has, in fact, remained for the learned counsel for the county alone to discover that these words, "to some point in the northwestern boundary line of the state, to be hereafter determined," constitute or contain any such condition precedent, and, with all respect to the learned counsel, he is clearly mistaken in his supposed discovery.

The said Ordinance of March 9, 1868, did not authorize *any* **county** *by name* **to subscribe for stock of a railroad company and issue county bonds in payment therefor. Said ordinance did not name Forsyth County as a county thus authorized to subscribe for stock and to issue bonds, but the Supreme Court of North Carolina in the**

Hill case **and the** *Belo case* **decided that said Ordinance of March 9, 1868, did authorize Forsyth County to subscribe for stock and to issue bonds. On precisely the same reasoning, Wilkes County was by the said Ordinance of March 9, 1868, also authorized to subscribe for stock and to issue bonds. No possible distinction can be drawn between the two countries as respects such authority.**

FORSYTH AND WILKES COUNTIES IN THE SAME CATEGORY.

It is true that said ordinance does name Forsyth County in Sections 1 and 5. In Section 1 the language is (Record, p. 10):

"That for the purpose of constructing a railroad of one or more tracks from some point on the North Carolina Railroad between the Town of Greensboro in Guilford County and the Town of Lexington in Davidson County, running by way of Salem and Winston in Forsyth County to some point in the northwestern boundary line of the state, to be hereafter determined, a company is hereby incorporated," etc.

This, it will be seen, is a mention of Forsyth County merely as a county *by way of which* the railroad will run to some point in the northwestern boundary line of the State. There is no indication in Section 1 of any purpose in said ordinance to authorize Forsyth County to subscribe for stock in said railroad company and to issue bonds therefor any more than to authorize any other county near or through which said railroad may run to make such subscription and to issue such bonds. The railroad by the route here mentioned in Section 1 runs and must run "near or through" Wilkes County just a certainly as it runs

through Forsyth County, and, therefore, so far as the said mention of Forsyth County in said Section 1 is concerned, Wilkes County is in no different category from Forsyth County, and as the Supreme Court of North Carolina is the *Hill case* and *Belo case*, decided that Forsyth County is authorized to subscribe for stock and to issue bonds, so by like reasoning, so far as said Section 1 is concerned, Wilkes County is also authorized to subscribe to stock and to issue bonds.

Forsyth County is mentioned again in Section 5 of said ordinance of March 9, 1868, which provides (Record, p. 11):

"Be it further ordained, That after the organization of said company and the election of the president and other necessary officers, the officers so elected shall proceed, under the advice of the directors, to locate the eastern terminus of the Northwestern North Carolina railroad, and shall proceed to construct said road, with one or more tracks, as speedily as practicable, in sections five miles each, to the towns of Winston and Salem, in Forsyth county, which portion of said railroad, when completed, shall constitute its first division: Provided, that if the distance from the nearest section to the towns of Winston and Salem be less than five miles, the same shall be considered a section."

This Section 5 is a *mandatory* provision upon the said railroad company to "proceed to construct said road with one or more tracks as speedily as practicable in sections of five miles each to the Towns of Winston and Salem, in Forsyth County." So much road the company is by this mandatory provision of the act expressly required to construct "*as speedily as practicable.*" But this provision of Section 5 of said ordinance does not limit the authority of said railroad company to construct a road only to Winston and Salem in Forsyth County, nor is further or additional legislation required in order that said railroad may be

constructed beyond Winston and Salem in Forsyth County.

Said ordinance of March 9, 1868, was ample authority to construct said railroad near or through Wilkes County without any further legislation. Said Section 5 expressly states that the line to Forsyth County is only a "portion" of said railroad, for it says "*which portion of said railroad* when completed shall constitute its first division." The railroad is described in Section 1 of the act and the company is incorporated for the express purpose

"of constructing a railroad of one or more tracks from some point on the North Carolina Railroad, between the town of Greensboro, in Guilford County, and the town of Lexington, in Davidson County, running by way of Salem and Winston in Forsyth County to some point in the northwestern boundary line of the state."

Here in Section 1 is the authority, and the road is expressly incorporated for that very purpose; and further on in Section 1 it is provided that the company

"shall be capable in law and equity of purchasing, holding, leasing and conveying estates, real and personal, and mixed, and acquiring the same by gift or device, so far as may be necessary for the objects herein contemplated and no further," &c., &c.

Section 9 provides for a mortgage to the State "*on the entire road.*"

Section 11 gives the company "the exclusive right of transporting persons and freight *upon said road*" (not upon that portion of the road to Winston and Salem, but upon "said road," that is, the entire road).

Section 12 provides that

"stockholders of said company may pay the stock subscribed by them either in money, labor or material for

constructing *said road*, as the Board of Directors may determine, and that *all counties* or towns subscribing stock to said company shall do so in the same manner," etc.

This section contemplates the construction of said road; that is, the entire road, and contemplates that the counties (not merely Forsyth County, but other counties) may subscribe to stock in said road.

Section 13 provides that

"The company shall have power to construct branches of said road, one of which shall run from the towns of Winston and Salem by way of Mount Airy, in Surry County, to the line of the State of Virginia."

Here then is an express power to construct "*branches* of said road," but if there is no power in the ordinance to construct *the road itself*, that is, the main line of road, as the general route is laid down in Section 1 of the ordinance, with what propriety could power be given to construct "*branches*" of said road? It would be an anomalous thing to hold that there was authority to construct branches of a road, but that there was not authority to construct the road itself.

The words "said road" in Section 13 obviously do not mean merely that portion of the road to the towns of Winston and Salem, in Forsyth County, for when the ordinance speaks of that portion of the road it speaks of it (Section 5) as a "*portion* of said railroad" and (Section 8) "sections of said road, as mentioned in Section 5 of the ordinance," showing that the ordinance when it used the words "said road" meant the *entire road* as the general route is laid down in Section 1 of the said ordinance.

In other words, Forsyth County is not mentioned by name in the said ordinance as a county authorized to

subscribe for stock in said railroad and to issue bonds, but *is mentioned by name only in connection with the route of the railroad;* and as it is demonstrated that the railroad must pass "near or through" Wilkes County, just as certainly as it passes "near or through" Forsyth County, so it is just as certain that Wilkes County was authorized by said ordinance and Act of 1852 to subscribe for stock and to issue bonds as that Forsyth County was so authorized.

The County's Defense Without Merit.

This attempted defense on the part of the county, moreover, that the route of this road as constructed into Wilkes County was one which was not authorized by the said ordinance of 1868, is not only not true in fact, but is a defense utterly unworthy of the people of the county. The purpose of the said ordinance clearly was to authorize the construction of a railroad from the initial point "by way of Salem and Winston, in Forsyth County, to some point in the northwestern boundary line of the state," and, furthermore, to authorize any county "near or through" which said railroad should run, *upon having a vote of the people of the county,* to issue bonds to aid in the construction of such railroad. The people of Wilkes County voted with practical unanimity to issue these bonds. They did it for the purpose of obtaining the railroad and the railroad facilities. The bonds were voted. The railroad company constructed the railroad into Wilkes County, and the county has had the benefit of it ever since. On these facts there is not only no legal merit, but no moral or equitable merit, in the county's attempting to raise any such frivolous defense.

The learned counsel for the county also mentions the fact that the ordinance of March 9, 1868, in Section 12 thereof, refers to the act incorporating the North Carolina and Atlantic Railroad Company, whereas the name of that Company should be the Atlantic and North Carolina Railroad. This was obviously a mere clerical error. The company and the act intended were certain, as was held by the Supreme Court of North Carolina in the said *Belo case*, 76 N. C., 489, where the Court expressly refers to Section 34 of the said act of 1852, which is printed in the record in this case, and mentions the same as being a part of the act referred to in the said Section 12 of the ordinance of March 9, 1868. This decision was rendered long before the bonds in question in the present case were issued, and is conclusive in the matter as respects the present bonds.

The learned counsel for the county also argues that the framers of the Constitution of 1868 clearly intended to safeguard the interests of the counties by having the attention of legislators called sharply to any proposition to levy a tax upon counties represented by them. We would go even further and say that the framers of the Constitution in 1868 clearly intended to safeguard the interests of the counties by requiring that the voters of the county should vote upon any proposition to levy a tax or incur a debt, except for necessary expenses. This was the means by which any undue taxation or undue incurring of debt was to be checked and regulated. The people of the county voted almost unanimously in favor of the issue of the bonds in the present case, and any attempt now by the

learned counsel to argue that any great public policy announced in the Constitution of 1868 has been disregarded is utterly without foundation.

Galloway case wholly inapplicable.

The learned counsel for the appellants cites the case of *Galloway vs. Chatham Railroad Company*, 63 N. C., 147 (1869). That case arose under Article V., Section 4, of the Constitution of North Carolina not in any way involved in the present case), which is as follows :

" SECTION 4. Until the bonds of the State shall be at par, the General Assembly shall have no power to contract any new debt or pecuniary obligation in behalf of the State, except to supply a casual deficit, or for suppressing invasion or insurrection, unless it shall in the same bill levy a special tax to pay the interest annually. And the General Assembly shall have no power to give or lend the credit of the State in aid of any person, association or corporation, except to aid in the completion of such railroads as may be *unfinished at the time of the adoption of this Constitution*, or in which the State has *a direct pecuniary* interest, unless the subject be submitted to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon."

* * * * * *

This section refers wholly to bonds issued by the *State*, and not at all to bonds issued by the counties, and its provisions are different from any provisions, either constitutional or statutory, relating to bonds issued by counties. The Court in that case held (p. 158),

" that the road provided for in the act of 18th December, 1868, is neither an unfinished road nor one in which the *State* had, at the adoption of the constitution [April 24, 1868], a direct pecuniary interest."

No such question arises under the constitutional provisions or legislation applicable to the Wilkes County bonds.

The question in the case of *Galloway vs. Chatham Railroad Company*, 63 N. C., 147, was whether, under Article V., Section 5 (now Section 4), of the constitution, the general assembly of North Carolina had the power to pass the act of December 18, 1868, eight months after the adoption of the constitution (April 24, 1868), authorizing **a new line of railroad,** and providing for the issue of **state railroad aid bonds, without submitting the question to a vote of the people of the State.** PEARSON, C. J., states the question involved and decided in the case as follows:

(p. 151): "Under Article V., Section 5, a question is made 'Has the General Assembly power to create this debt of two millions in aid of the Chatham Railroad Company unless the subject be submitted to a direct vote of the people?'"

The Constitution, Article V., Section 4, provided that no such State bonds could be issued

"except to aid in the completion of such railroads as may be *unfinished at the time of the adoption of this constitution*, or in which the State has a *direct pecuniary* interest, unless the subject be submitted to a direct vote of the people of the State and be approved by a majority of those who shall vote thereon."

The precise question, therefore, in this *Galloway case* was whether the road in question, first authorized December 18, 1868, eight months after the constitution was adopted, was an "*unfinished*" road "*at the time of the adoption of the constitution*" within the meaning of the said Section 4, and the Court held, of course, it was not.

No such question arises in the present case. The provisions of the Constitution above quoted, which were involved in the *Galloway case*, have absolutely no application to or connection with the present case.

The Supreme Court of the State of North Carolina distinctly declared in said *Hill* and *Belo cases* that the said ordinance of 1868 incorporating the Northwestern North Carolina Railroad Company was *per se* and without any legislative act sufficient authority for Forsyth county to subscribe to the capital stock of the Railroad Company and issue county bonds in payment therefor. The Court distinctly puts its decision upon the ground that the "bonds were valid in the hands of *bona fide* holders without the aid of this healing act;" that is, under the ordinance of 1868, and without the aid of the act of August 11th, 1868. This is not any mere dictum of the Court, but is the ground on which the Court expressly rested its decision. Mr. Justice HARLAN in this very case (180 U. S., p. 529) has expressly so stated. It is true that the North Carolina Supreme Court also rested its decision upon the further ground that, "if any defects existed in the bonds," "the ratifying act of August 11, 1868, was a curative act and validated both the county subscription and the issue of the bonds." The court put its decision on both grounds, and not on either ground to the exclusion of the other. The language of the court as respects both of these grounds, therefore, amounts to a decision, and its language on either ground is not a mere dictum.

Furthermore, This Decision in the Hill Case Made in 1870, and This Decision in the Belo Case Made in 1877, Construing This Ordinance of the Constitutional Convention of 1868, was a Construction Upon Which the Purchasers of the Bonds in Question in the Present Case Had a Right to Rely.

When the bonds in the present case were issued in 1889 these two decisions above quoted stood unreversed and unquestioned in the officially printed reports of the Supreme Court of North Carolina, construing the said ordinance. At the time of the issue of these bonds there was not a word or syllable in the said reports contrary to the said decisions. The said ordinance of the Constitutional Convention has not been in anywise changed either by constitution or by statute, from what it was when the above-quoted opinions of the Supreme Court of North Carolina to the two Forsyth county cases, were rendered.

The provisions of the Constitution of the State of North Carolina, mentioned in the said first question, certified to this Court by the Circuit Court of Appeals —namely, Article II., sections 14 and 16, and Article V., sections 1, 4, 6 and 7, and Article VII., section 7— were precisely the same at the date of the rendering of the decisions in the two *Forsyth county cases* above cited as they were when the bonds in question in the present case were issued.

As stated above, the same ordinance of the Constitutional Convention of 1868 had not been repealed, nor had the Legislature attempted to repeal it. Certain

additional acts had been passed; but if on this branch of the argument it be conceded, merely for the sake of the argument, that all of those acts had fallen, because not properly enacted, nevertheless the said ordinance of the Constitutional Convention of 1868 stood when these bonds were issued, and stands to-day, precisely, the same as it stood when the bonds were issued which were in question in the two Forsyth county cases of *Hill* and *Belo* above quoted.

This present case, therefore, is brought directly within the principles announced by the Supreme Court of the United States in numerous cases in which this Court has held that when a contract, and especially one which is evidenced by commercial paper, was valid under the Constitution and statutes of a state, as then construed by the State Court, it will be held valid by the Supreme Court nothwithstanding the fact that after such contract was made the State Court may, as in the case now at bar, have changed its decisions.

This proposition was certified to the Circuit Court of Appeals in Answer No. 2 by the Supreme Court of the United States (Record, p. 110; 180 U. S., 533).

Recital of the Act of February 20, 1879, in the bonds is immaterial.

It is immaterial that the bonds in question in the present case (Record, p. 16) recited that they were issued by authority of the act of February 20th, 1879, which was an attempted amendment of the Convention ordinance of 1868, and did not recite that they were issued under the ordinance itself, for it is well-settled law that if there was, in fact, legislative or legal authority for the issue of bonds, it is immaterial that the bonds recite another legislative act which did not give such authority.

This express proposition was considered and decided by this Court when this case was here before on certified questions from the United States Circuit Court of Appeals, and we might content ourselves with merely referring to what this Court then decided (see *Wilkes County vs. Coler*, 180 U. S., 506, 524). We may, however, state briefly the principle on which this proposition rests.

It was not necessary that the bonds in question should recite the Act of February 20, 1879, at all, nor was it necessary that they should recite any act under which they were issued. Any recital of this Act of February 20, 1879, therefore, being useless, could be rejected as surplusage without vitiating the necessary and substantial parts of the bonds. This is under the familiar rule of law expressed in the legal maxim, "*Utile per inutile non vitiatur.*"

A decision of this Court exactly in point is *Anderson County Commissioner vs. Beal.* 113 U. S., 227 (1885). In that case Mr. Justice BLATCHFORD, giving the opinion of this Court, says (p. 236) :

" It is not disputed that the recital in the bond that it was issued under the act of February 26th, 1866, Sess. Laws of Kansas, 1866, ch. 24, page 72, was an error * * * (p. 237). It is very clear that there was legislative authority under the act of 1869 for the issuing of the bonds in question. There was an election, and the requisite majority of those who voted assented to the proposition for the subscription to the stock and the issue of the bonds, and the subscription was made by the proper officers, and they issued the bonds." etc. * * * (p. 238). " The bond recites the wrong act, but if that part of the recital be rejected there remains the statement that the bond ' is executed and issued ' ' in pursuance to the vote of the electors of Anderson County of September 13th, 1869.' The act of 1869 provides that when the assent of a majority of those voting at the election is given to the subscription to the stock the county commissioners shall make the subscription and shall pay for it, and for the stock thereby agreed to be taken, by issuing to the company the bonds of the county."

This Court, therefore, held the bonds valid, notwithstanding they recited the wrong act.

In Dillon on "Municipal Corporation," Fourth Edition, Section 523, note, it is stated :

" That bonds recite as authority for the issue a wrong act of the legislature does not necessarily invalidate them, if it can be shown that they were in fact issued under an act conferring the power " (citing *Anderson County Commissionere vs. Beal, supra,* and other cases).

See, also, to the same effect :

Knox County vs. Ninth National Bank, 147 U. S., 91.

Cairo vs. Zane, 149 U. S., 122.

Furthermore, even if the rule were not as laid down in *Anderson vs. Beal, supra*, these bonds recite that they are issued by authority of an act of the General Assembly of North Carolina, ratified the 20th day of February, 1879, entitled "An Act to amend the charter of the Northwestern North Carolina Railroad," etc. The holder of these bonds is therefore notified of this act, but **on examining this act he will further see that this act is an amendment "of the ordinance of the convention of one thousand eight hundred and sixty-eight, ratified the ninth day of March, one thousand eight hundred and sixty-eight."** As said ordinance gave authority for the issue of these bonds, and as the holder of the bonds is thus, by reference to the Act of February 20, 1879, referred to the said ordinance of March 9, 1868, which the said Act of February 20, 1879, amends, there is no reason why a bondholder may not examine and refer to the said ordinance as authority for the issuance of the bonds in question.

In the case of *Anderson vs. Beal, supra*, the Supreme Court of the United States held that even if the bond recited a wrong act, it was competent to rely upon another act which really did give authority, although such other act was not recited. Much more is it competent in the present case, to refer to this ordinance of March 9, 1868, as the bondholder did, by reference as above stated, have notice of the said ordinance by the recital in the bond and by an examination of the Act of February 20, 1879, there recited.

See, also, *Evansville vs. Dennett*, 161 U. S., 434, in which case a bond issued by the City of Evansville, in aid of the Evansville, Carmi and Paducah Railroad Com-

pany recites (page 436) "the original City charter of Evansville, approved January 27, 1847, and an act amendatory thereof, approved March 11, 1867," and in which case this Court held that the recital of the invalid amendatory act did not vitiate the bonds, but that they were good under the original act. So, also, this Wilkes County bond (Record, page 16), in reciting the title of the amendatory act of February 20, 1879, recites "The Charter of the Northwestern North Carolina Railroad," that is, the ordinance of March 9, 1868; and of course as the said ordinance gives full authority to issue these bonds, the recital of the amendatory act of February 20, 1879, does not vitiate the bonds.

The learned Judge who gave the majority opinion in the case of *Commissioners of Wilkes County vs. Call*, 123 N. C., 308, 1898, cited the case of *Gilson vs. Dayton*, 123 U. S., 59, as holding that the recital of a wrong act is fatal to the validity of bonds. This case does not hold any such thing. On the contrary, the whole case is stated in the opinion United States Supreme Court, given by Mr. Chief-Justice WAITE, the opinion being in full as follows—to wit (p. 61):

"The judgment in this case is affirmed on the authority of *Crowe vs. Oxford*, 119 U. S., 215. See, also, *Post vs. Supervisors*, 105 U. S., 667, 691. It appears on the face of the bonds sued for that the subscription was made under and by virtue of the act of February 18, 1857, and that the vote of the town was taken at a special town meeting called upon the 'application in writing of fifty legal voters of said town,' which is in accordance with the provisions of that act. The act of March 6, 1867, which the plaintiff now claims is sufficient to support the bonds, requires that the application for the town meeting shall be made by 'twenty voters and *tax-payers*.' The record does not show that any of those who signed the application for the meeting at which the vote was taken were taxpay-

ers. It thus appears from the bonds themselves not only that they were issued under the act of 1857, but that they were not issued under that of 1867."

It thus appears that in the case of *Gilson vs. Dayton* the act which might, in fact, have given authority was not followed, as there was not any application of *taxpayers ;* and, of course, the bonds in that case were held invalid.

The late decision, 1898, by the State Supreme Court *(Call Case,* 123 N. C., 308) **overruling the Hill and Belo cases is intrinsically unsound and proceeds upon mistaken data.**

The Supreme Court of North Carolina, in the case of *Commissioners of Wilkes County vs. Call,* 123 N. C., 308, decided in 1898, by a bare majority, long after these Wilkes County bonds were issued, has undertaken to hold for the *first time* that the said ordinance of March 9, 1868, adopted by the Constitutional Convention of 1868, did not confer any power upon Wilkes County to subscribe for the stock of the railroad company and issue these bonds. In attempting to do this the Court has undertaken to overrule the decisions in the *Hill case* and the *Belo case,* concerning the Forsyth County bonds, decided in 1870 and 1877 respectively, and above quoted. The Court, in the *Call case,* by a bare majority, said that these two cases were distinguishable, but it gave no real reason for any distinction. In some respects the statements

of the Court in *Commissioners vs. Call* are obviously incorrect; for example, the Court says (p. 318):

"Another important point of difference is that the Forsyth county bonds were voted and subscribed within a few months after the passage of the ordinance, before whatever power it may have given, if any, had expired by its own limitation."

It is impossible to conceive what the Court meant by the ordinance of 1868 expiring "by its own limitation." There is no limitation in the ordinance which makes it expire. The *Hill and Belo cases*, above quoted, do, as we have already seen, expressly decide that the ordinance gave power to issue the bonds there in question.

Again, the Supreme Court of North Carolina, in the *Call case*, says:

(p. 321): "The ratification of the constitution on the 24th day of April, 1868, when it went into effect for all domestic purposes, annulled all special powers remaining unexecuted and not granted in strict accordance with its requirements. Article II., Section 14, is as follows: 'No law shall be passed to raise money on the credit of the State or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each House of the General Assembly, and passed three several readings, which readings shall have been on three different days, and agreed to by each House respectively, and unless the yeas and nays on the second and third reading of the bill shall have been entered on the Journal.' Article VII., Section 7, is as follows: 'No county, city, town or municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of a majority of the qualified voters therein.'"

This proposition of the Court, and the sections of the Constitution cited by it, do not at all affect the question of the continued existence of the said ordinance of the Constitutional Convention incorporating the Northwestern North Carolina Railroad Company, ratified March 9th, 1868. Article II., Section 14, of the Constitution, quoted by the Court, is as follows: "No law shall be passed," etc. [Text of said Section 14, see Appendix to this Brief]. This, by its very terms, and under all the authorities, is a direction to the Legislature. "No law *shall* be passed," etc., obviously means shall *hereafter* be passed. This Section 14 occurs in Article II., which is devoted to directions to the Legislative Body, and it prescribes a rule of procedure for the future enactment of laws *by the Legislature.* It does not either expressly or impliedly repeal or annul any existing laws of the State. As stated in *County of Scotland vs. Thomas*, quoted below: "It does not purport to take away any authority already granted. It only limits the power of the legislature in granting such authority for the time to come."

This precise question was before the Court in *County of Scotland vs. Thomas*, 94 U. S., 682. The decision of the Court on that point is stated as follows (p. 688):

"The clause of the Constitution on which the defendant relies is the fourteenth section of art II., and is as follows: 'The general assembly shall not authorize any county, city, or town to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto.' **This prohibition, it will be observed, is against the legislature's authorizing municipal subscriptions or aid to private corpo-**

rations. It does not purport to take away any authority already granted. It only limits the power of the legislature in granting such authority for the time to come."

See, also, to the same effect:

County of Callaway vs. Foster, 93 U. S., 567.
County of Henry vs. Nicolay, 95 U. S., 619.
Louisiana vs. Taylor, 150 U. S., 454.
Macon County vs. Shores, 97 U. S., 272.
Howard County vs. Paddock, 110 U. S., 384.

See, also, other cases cited in "Dillon on Municipal Corporations," Fourth Edition, Section 542, note.

The principle of these decisions is further recognized by the Supreme Court of the United States in *Norton vs. Brownsville*, 129 U. S., 479, where that Court, Mr. Chief-Justice FULLER giving the opinion, after citing certain other cases which arose under provisions of a constitution which directly prohibited counties, cities, etc., from issuing railroad aid bonds, says (p. 490):

"These cases sufficiently illustrate the distinction between the operation of a *constitutional limitation upon the power of the legislature*, and of a constitutional inhibition upon the municipality itself. *In the former case past legislative action is not necessarily affected*, while in the latter it is annulled."

Article VII., Section 7, of the Constitution of North Carolina, is a "constitutional inhibition upon the municipality itself," but it only inhibits the issue of railroad aid bonds by a municipality "unless by a vote of a majority of the qualified voters therein." There was a vote of a majority of the qualified voters in the case of these Wilkes county bonds, and, therefore, this "constitutional inhibition upon the municipality itself" was not violated by the issue of said bonds.

Ordinance of March 9, 1868, not repealed by the Constitution or any legislative act and was as to the power to issue bonds in full force in 1889 when the bonds in suit were issued.

Not only was this proposition decided by the *Hill case* and the *Belo case*, but, as the Court held, in this case (180 U. S., p. 529), this decision in the *Hill* and *Belo* cases was correct, as we proceed to show.

Article II., Section 14, of the Constitution, does not either expressly or impliedly require the re-enactment of existing legislation, even statutory legislation, much less ordinance legislation enacted by the Convention that framed the Constitution. Not only so, but another part of the Constitution, Article IV., Section 19, expressly provides :

"The laws of North Carolina, not repugnant to this constitution, or the constitution and laws of the United States, shall be in force until lawfully altered."

Also Article VII., Section 12, provides :

"All charters, ordinances and provisions relating to municipal corporations shall remain in force until legally changed unless inconsistent with the provisions of this constitution."

There are no other repealing provisions in the Constitution of 1868. No attempt is made in the Constitution of 1868 to repeal the said ordinance of March 9, 1868, nor is there anything in said ordinance inconsistent with the constitution.

That a "county" is a "municipal corporation" within this Section 12 appears from the language of Section 7 of the same Article VII., which speaks of "county, city, town or other municipal corporation."

This Article II., Section 14, does not provide any method of passage of laws *theretofore* enacted, and has no application to any laws previously passed.

Article VII., Section 7, however, does operate directly upon the county or other municipal corporation, and it does provide that such a county "shall not contract any debt," etc., "except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein." [Text of said Section 7, see Appendix to this Brief.] This section, however, does not expressly or impliedly repeal even any previously-existing statute. Much less does it repeal this ordinance of the constitutional convention. What this section does do is to operate directly upon the municipality and to provide that the municipality "shall not contract any debt," etc., "unless by a vote of a majority of the qualified voters therein." Such a vote was had in the present case, and this section of the constitution therefore, did not prohibit the issue of these bonds of Wilkes County.

Applying this language of Article VII., Section 7 of the constitution to the said ordinance of the constitutional convention, it is obvious that even if this ordinance were in the nature of a statute only, the ordinance would not be repealed, because the said ordinance, by referring to the Act of 1852, Sections 33–37, above quoted, expressly provides for the holding of an election by the qualified voters of the county to vote upon the question of the issue of the bonds. The said ordinance, therefore, is not inconsistent with the said Article VII., Section 7, of the constitution, and

was not repealed by it. We have already seen that the said ordinance was not repealed by Article II., Section 14, of the constitution.

Furthermore, the said Article II, Section 14, has no application to the said ordinance. The said ordinance is not a statute, and is, therefore, not within Article II., Section 14. This Section 14, is addressed to the legislature, and the words "no law shall be passed," etc., in this said Section 14 mean no law enacted by the legislature. The said ordinance was enacted by the constitutional covention, and the language of Article II., Section 14, is wholly inapplicable. For example, there were not two houses in the constitutional convention, and, therefore, the ordinance could not have been agreed to by *each house respectively*, etc., etc.

The Supreme Court of North Carolina, then, committed an obvious and plain error, in the *Call case* in holding, or attempting to hold, that either Article II., Section 14, or Article VII., Section 7, repealed, or undertook to repeal, the said ordinance adopted by the constitutional convention.

Moreover the said ordinance and Sections 33 to 37 of the Act of 1852, made part of it, fully comply with Section 6 and 7 of Article V. of the Constitution, as fully appears from the "special" character of said ordinance—even if said Sections 6 and 7 can apply to said ordinance.

The true nature and effect of the said ordinance in-

corporating the Northwestern North Carolina Railroad Company appears not to have been considered by the Supreme Court of North Carolina in the said *Call case*.

This is, perhaps, not surprising, as there was no brief and no counsel before the court in that case to present anything in opposition to the claim of the county commissioners that these bonds were invalid.

There is neither an EXPRESS nor IMPLIED REPEAL of the Ordinance of March 9, 1868, and the said Ordinance was in full force when the bonds in suit were issued, and the same were issued in full conformity with its provisions and with the provisions of the Constitution.

When this case was argued before it was strongly insisted by the counsel for the county that the Ordinance of March 9, 1868, did not survive the adoption of the Constitution of North Carolina in April, 1868. This point was fully argued, and this Court expressly held that the Supreme Court of North Carolina in the *Hill* and *Belo cases* had decided the point that the Ordinance did survive the adoption of the Constitution and was unaffected by it, and that point is, we conceive, no longer open for argument in this Court. But if this point shall be re-argued by the counsel for the county, we now proceed to show that this Court rightly decided that the point had been previously adjudged in the same way by the Supreme Court of North Carolina in the *Hill* and *Belo cases*.

There being no *express* repeal by the constitution of the ordinance of March 9, 1868 (which ordinance by

reference includes Sections 33, 34, 35, 36 and 37 of the charter of the North Carolina and Atlantic Railroad Company, being chapter 136 of the laws of North Carolina, 1852), at the very utmost the constitution would affect the said ordinance only so far as it was plainly inconsistent with it; that is to say, it would be a *repeal*, if at all, *by implication*. On the contrary, there being no conflict between the ordinance and the constitution, relating to the power to issue these bonds, the constitution itself, in express terms, recognizes and continues the ordinance in force, even if it be treated as an ordinary enactment, since Section 19, Article IV., of the constitution provides as follows:

"SECTION 19. The laws of North Carolina, not repugnant to this constitution or the constitution and laws of the United States, shall be in force until lawfully altered."

Now, if you lay the constitution adopted April 24, 1868, alongside the ordinance of March 9, 1868, no repeal or annulment of the power of counties, mentioned in the ordinance of March 9, 1868, to take stock or issue bonds will be found. On the contrary, the scheme of the constitution and the scheme of the ordinance are the same. The ordinance authorizes counties on or near the line of the chartered railroad to subscribe for stock on a vote of a majority of the qualified voters of the county. The constitution, Article VII., Section 7, authorizes counties to become subscribers to the stock of railroad companies on "a vote of the majority of the qualified voters therein;" that is to say, both under the ordinance and constitution counties may be authorized to subscribe stock when sanctioned by a majority of the qualified voters of the county, and such a majority did sanction the

issue of the bonds of Wilkes county in the present case.

It is alleged in the complaint (paragraph 22, Record, p. 7) as follows:

"That the county of Wilkes, acting through its board of commissioners, and in accordance with the ordinance and acts, as above set out, subscribed the sum of one hundred thousand dollars to the capital stock of the North Western North Carolina Railroad Company, the proposition to subscribe the said amount having *been submitted to the qualified voters of the county at an election held according to law, and a large majority of the said qualified voters having voted in favor of the same.*"

This is admitted in the answer (paragraph 22, Record, p. 27) as follows:

"These respondents, still denying the authority of the former commissioners to issue bonds or subscribe to the capital stock of the said company, admit that they did subscribe and issue bonds in the amounts alleged in the complaint, and that *it was ascertained and declared that a majority of the qualified voters of Wilkes county had voted in favor of making such subscription, and that it is now too late to question said finding as to said vote.*"

Moreover, the bond recites (Record, p. 16) that the said issue of bonds now in question was

"authorized by *a vote of a majority of the qualified voters of Wilkes county*, by an election regularly held for that purpose on the 6th day of November, A. D. 1888, and by an order of the board of commissioners of Wilkes county, made on the first day of April, A. D. 1889."

That this recital creates an estoppel as to the vote, even though the ordinance of 1868 is not recited in the bond as the authority for the issuance of the bonds, see *Anderson County vs. Beal*, 113 U. S., 227, quoted, *supra*, on this brief (see *ante*, p.).

So that in the present issue of bonds by Wilkes county there is no provision either of the ordinance of March 9, 1868, or of the constitution of the state which was adopted April 24, 1868, repealing, annulling, or in any way impairing or affecting the power of Wilkes county to issue the bonds in question.

As elsewhere pointed out in this brief (*ante*, p. 53) Section 14 of Article II. has no application, because that refers in the language "No law shall be passed," etc., to laws which shall be hereafter passed, and also refers only to laws to be passed by the General Assembly since it prescribes the method and manner of their passage by readings on three different days, and taking the ayes and the noes on the second and third readings in *each house*, and entering the same on the journal, &c., &c. These requirements in their terms and nature can have no reference or application to the ordinance of 1868, passed by the Constitutional Convention, which was *only one house* (see *ante*, p. 57).

If the question is still open to the county to argue that the ordinance of March 9, 1868, did not survive the adoption of the constitution in April, 1868, the conclusion that the ordinance did so survive is further shown to be correct by the considerations which we now proceed to present.

Ordinance of Constitutional Convention passed March 9, 1868, not inconsistent with Constitution. Section 7, Article VII. of Constitution may be read as amending said Ordinance and Act of 1852, if necessary.

The said ordinance of March 9, 1868, was of the same dignity as the constitution, and was operative *per se* by its own force, and it could be maintained, if necessary, that no provision of the Constitution of 1868 would operate to modify or repeal the said ordinance if there was any conflict between the two. But it is not necessary in the present case to maintain that proposition, for the constitution is not in anywise inconsistent with the said ordinance. Article VII., Section 7, of the constitution, which provides, in substance, that a county shall not contract any debt, etc., except for the necessary expenses thereof, unless by a vote of a majority of the qualified voters therein, might apply to, and operate directly upon, any county in the State, and thus, if necessary, be written in as an amendment to the said ordinance of March 9, 1868.

This point has been determined by the Supreme Court of North Carolina in the case of *Wood vs. Oxford*, 97 N. C., 227 (February Term, 1887) and *Rigsbee vs. Durham*, 99 N. C., 341 (February Term, 1888).

In *Rigsbee vs. Durham (supra)*, the Supreme Court of North Carolina says (page 347):

"That statute plainly declares the purpose and makes large provision, much in detail, for carrying it into practical effect. It provides that *if a majority of the votes cast* at such election shall be in favor of such tax, it shall be levied. It may be conceded for the present purpose that such a vote could not authorize the levy of such tax, but when, under the statute con-

taining this provision, a majority of *all the qualified voters of* the town vote in favor of it, such vote is sufficient to give the authority. When the legislature declares that a majority of the votes cast at the election shall give the authority, this certainly, in the nature of the matter, includes and implies its willingness and purpose, for the same and like considerations, to give it, if a majority of all the qualified voters of the town shall vote in favor of it. The nature of the statute—its purpose and provisions—all clearly indicate such intent, and we can see nothing in the constitution or sound public policy that forbids or prevents it. The chief and leading purpose is to give the authority to levy the tax if at least a majority of the votes cast shall be in favor of it, and the constitution (Art. VII., Sec. 7) declares that 'a vote of the majority of the qualified voters' of the town shall be necessary to give it. If the statute had omitted, as it might have done, to prescribe the necessary vote, the constitution would have determined it. This interpretation harmonizes the statute with the constitution, and gives effect to the legislative intent. *Wood v. Oxford*, 97 N. C., 227."

In *Wood vs. Oxford (supra)* the Supreme Court of North Carolina says (page 233):

"Now, it is clearly one of the declared purposes of the statute (Acts 1885, ch. 115) to authorize certain incorporated towns to make 'donations' in the way prescribed, to the railroad company, the defendant the Oxford and Clarksville Railroad Company, organized under and in pursuance of its provisions. And it plainly requires a proposition to make such a donation to be submitted to the 'qualified voters' of the town which it was proposed should make the same. It may be that the statute contemplates that if a simple majority of 'the qualified voters' *voting*, shall be in favor of such donation, this shall be sufficient to authorize it to be made. This is questionable, but we need not decide whether it so provides or not, because the purpose to allow such donations to be made is manifest, and it appears in the case before us that a clear majority of all the qualified voters of the town of Oxford voted in favor of the proposed donation of forty thousand dollars in question, thus certainly meeting the essential prerequisites provided by the statute and ob-

serving the provision of the Constitution (Art. VII., Sec. 7) forbidding towns and other municipal corporations to make a debt, except, &c., 'unless by a vote of a majority of the qualified voters therein,' and likewise observing the requirements of the charter of that town (Acts 1885, Pr. Acts, ch. 21, Sec. 30). As the purpose of the Legislature to allow such donations to be be made is clear and express, it is sufficient, if the condition upon which it might be made has certainly, in the most adverse view of the proposition as to the vote, happened.

"Unquestionably, the Constitution allows a county, city or town to contract, pledge its faith, or loan its credit, for a proper purpose, if authorized to do so by the Legislature, when and if a majority of the qualified voters therein shall vote in favor of the same.

In this case, the purpose, as we have seen, was lawful—the Legislature authorized the donation to be made, and a debt to that end to be contracted, and a majority of all the qualified voters in the town of Oxford voted in favor of the donation, and thus in favor of the debt to be made. Thus the statute and the Constitution allow and sanction it, and it must be upheld as valid and lawful."

The fact as to "a vote of a majority of the qualified electors" (the very words used by the Constitution, Art. VII., Sec. 7) is conclusively established by the recitals in the bonds ("a vote of a majority of the qualified voters of Wilkes County") and by the allegations of the complaint and answer quoted at length in this brief, page 16.

That in such a case such a provision of the constitution operates to amend an existing charter passed by an act of the legislature is expressly held in the case of *East St. Louis vs. Amy*, 120 U. S., 600, and also in the case of *East St. Louis vs. People*, 124 Ill., 655.

In the case of *East St. Louis vs. Amy, supra*, the facts were as follows: In 1869 the legislature of Illinois had passed an act granting the city of East St.

Louis power to issue $100,000 of bonds and to levy a tax of three mills for the payment thereof. In 1870 the new constitution of Illinois went into effect, which, in substance required that a municipal corporation issuing any bonds should, at or before the time of doing so, provide for the levy and collection of a sufficient tax to pay the interest on such bonds, and to pay the principal within twenty years. This Court held that this provision of the constitution of Illinois of 1870 *did not repeal the said authority granted by the said act of 1869*, but that it amended it, and that *this amendment was, in effect, written into the charter*, so that the $100,000 of bonds were still authorized to be issued; but that, instead of the three mill tax levy provided in the charter for the payment thereof, a tax levy sufficient for the full payment of the interest and principal could be levied, as required by the constitution.

The Supreme Court of Illinois, in the case of *East St. Louis vs. People*, *supra*, decided the same question the same way, and cited with approval the opinion of the Court in *East St. Louis vs. Amy*, *supra*.

See, also, to the same effect the case of *Neal vs. Delaware*, 103 U. S., 370, cited by this Court in *East St. Louis vs. Amy*, 120 U. S., 600, 603, *supra*, in which case it was held that the Fifteenth Amendment to the Constitution of the United States of itself, and without any action by the State, was written into the election law and into the jury law of the State of Delaware as an amendment thereof, and that *no new legislation* for this purpose was required by the State of Delaware, but that these election laws and the jury laws stood, and were in force, as thus amended by the Fifteenth Amendment to the Constitution of the United States.

The Vote Required by the Constitution of North Carolina, Art. VII., Sec. 7, Was Had for the Bonds Now in Question.

A vote of the people of the County was required also by the said Ordinance of March 9, 1868, and sections 33–37 of said Act of 1852, referred to in Section 12 of said ordinance. The vote which was had satisfied both said Article VII., Section 7 of the Constitution and the said ordinance and said Act of 1852.

The learned counsel for the county has at times repeated the error of Justice FURCHES, that in the *Hill* and *Belo cases* the subscription was made and the bonds were issued *before* the adoption of the Constitution of 1868. It is difficult to understand why the learned counsel has repeated this obvious error and based any argument thereon. The facts are stated and the dates specifically given by the Supreme Court of North Carolina in the *Hill case*, 67 N. C., 367, and again in the *Belo case*, 76 N. C., 489. It clearly and unquestionably appears there that the subscription was not made until the *June Term, 1868, after* the constitution adopted April 24, 1868, went into effect; and the bonds were not issued until after August 11, 1868, for they recite an act of that date.

The learned counsel for the county apparently takes the unsound and amazing position that in the *Hill case* and *Belo case* the Supreme Court of North Carolina made a "*grave mistake as to the very essence and nature of the authority relied on*," and that it is the duty of this Court now to correct the mistake made by the

Supreme Court of North Carolina in these cases. The fact is, the Supreme Court of North Carolina, in the *Hill* and *Belo cases*, made no mistake, but correctly construed the said ordinance of March 9, 1868, as giving, *per se*, authority to issue bonds precisely like the bonds now in question; but, even if the Supreme Court had made a mistake in the *Belo case*, that case would, under familiar principles, be conclusive in favor of the holders of the present bonds, since that case was decided long before the present bonds were issued, and at the time of their issuance there was not any decision against their validity, nor any decision in any way modifying or overruling the said *Hill* and *Belo cases*.

The Supreme Court of North Carolina, in the Recent Case of Commissioners of Wilkes County vs. Call, is Clearly in Error in Its Consideration and Statements of the Hill and Belo Cases.

The Supreme Court of North Carolina, in *Commissioners vs. Call* (123 N. C., 308, p. 317), 1898, undertakes to distinguish the case of *Belo vs. Commissioners* (76 N. C., 289), by saying as follows:

"We have not overlooked the fact that in *Belo vs. Commissioners*, 76 N. C., 488, this court strongly intimates that Section 12 of the charter did confer the authority given in Section 33 of the act of 1852" [Section 2 of the ordinance of the constitutional convention gave the power, and Section 12 prescribed the manner of its exercise], "but it does so incidentally and with little discussion, because it was not denied in the pleadings. This was not the determining point in the case, which turned chiefly upon the recitals in the bonds and the ratifying act of 1868. This is clearly shown in the opinion itself, which devotes four pages

to the discussion of equitable estoppel arising on the recitals, and about half a page to the possible binding effect of the ordinance, winding up with the significant sentence, on page 497, that ' as the case is presented to us, that question does not arise, and we do not decide it.' It evidently did not receive careful investigation, as it apparently did not arise on the pleadings. The court stated that the ' principle of equitable estoppel is a most important element in the transaction,' and that the recitals in the bonds (which are essentially different from those now before us) constituted an estoppel in *pais* upon the county of Forsyth."

It cannot be possible that it is necessary to remind this Court that there cannot be any estoppel by recitals where there was absolutely no legislative authority for the issue of bonds. The whole discussion of the Supreme Court of North Carolina in *Belo vs. Commissioners*, which, as stated by the Court in the case of *Commissioners us. Call*, occupied four pages, proceeded upon the only possible ground—namely, *that there was legislative authority* in the said Ordinance of 1868, but that perhaps that authority had not been strictly followed. The question which the Court, on page 497, says " does not arise " is not what the Supreme Court of North Carolina, in the *Call case*, apparently means to give the impression that it is, but it is this question, stated in the very words of the opinion of the Court in *Belo vs. Commissioners*, to wit:

" When the subscription was voted there is authority and reason for asserting that the Justices could have been compelled by process of law to make the subscription, unless in defense they could have shown that the election was not fairly conducted but was influenced by the fraud of the Railroad Company (*People v. Supervisors*, 27 Cal., 655). As the case is presented to us, that question does not arise and we do not decide it."

On the question of whether there was power to issue the bonds, the Court said, distinctly, in *Belo vs. Commissioners :*

" The county was clothed with the power to issue them, and it is admitted that a majority vote sanctioned the subscription of stock and the issue of the bonds."

Again, the Court said :

" It has been one purpose of this opinion to show that the bonds were valid in the hands of bona fide holders without the aid of this healing act" [that is, the act of August 11, 1868], the only other authority being the said ordinance.

In connection with this case of *Commissioners of Wilkes Co. vs. Call* (123 N. C., 308, 1898), we desire to call the attention of this Court to what is obviously an error in the statement of facts in the dissenting opinion of Justice FURCHES. He says (p. 328) :

" On the 25th of March, 1868, the county of Forsyth subscribed $100,000 to said corporation [Northwestern North Carolina Railroad Company], which subscription was held to be valid in *Hill vs. Commissioners*" (67 N. C., 367).

The date, March 25, 1868, is obviously an error. This error has been quoted and repeated from time to time by the learned counsel in the present case. It appears from the statements of fact made by the Supreme Court of North Carolina, in the case of *Hill vs. Commissioners*, not that the bonds of Forsyth County were issued on March 25, 1868, but that on March 25, 1868, the justices made an order to submit the question of subscription to the qualified voters of the county, the vote to be taken on April 4, 1868. It also

appears that the returns of the election were made to the June Term, 1868, of the County Court and that the said court, at the June Term, ordered the subscription to be made. It further appears from the official report of the case of *Belo vs. Commissioners of Forsyth County*, that, of the said bonds, some, at least, were not sold until March 5, 1869, and that these bonds recited that they were "authorized by an ordinance of 1868, by an order of the Court of Pleas and Quarter Sessions of Forsyth County, at June Term, 1868, and re-enacted and ratified and confirmed by an act of the General Assembly, ratified the 11th day of August, 1868," so that the said bonds could not possibly have been issued before the 11th of August, 1858.

On this state of facts, the theory advanced by the Supreme Court of North Carolina, in the case of *Commissioners vs. Call*, 123 N. C., 308, 1898—namely, that these two Forsyth County cases of *Hill vs. Commissioners* and *Belo vs. Commissioners*, could have decided that the ordinance of 1868 gave power to issue the Forsyth County bonds, and yet, that, consistently with these two cases, the North Carolina Court, in this later Wilkes County case, could decide that the constitution of 1868, which was ratified by the people April 24, 1868, had wholly repealed the said ordinance of 1868, and that this later decision did not, in effect, overrule the two Forsyth County cases—upon this state of facts, we say, that theory is absurd, and is completely refuted by the chronology. If the constitution which went into effect *April 24, 1868*, completely repealed the ordinance of 1868 incorporating the Northwestern North Carolina Railroad Company as to the power of counties to issue bonds, then the Court ought not to have decided in 1870 and 1877, in the

two Forsyth County cases, that the said ordinance gave power to issue the Forsyth County bonds there in question, for those bonds were issued long after April 24, 1868, and bear on their face evidence that *they were issued after August 11, 1868*, for they recite the act of that date, as above stated.

Power of Counties given by the Ordinance of March 9, 1868, had not Expired by Limitation in 1889, when the Bonds in Suit were Issued.

The Supreme Court of North Carolina, in the case of *Commissioners vs. Call*, 123 N. C., 308, 1898, refer to the fact that the charter of the North Carolina and Atlantic Railroad Company, or the Atlantic and North Carolina Railroad, Chapter 136 of the laws of 1852, provides, in Section 45, that "If the said road be not completed within six years after the ratification of this act, this charter shall be forfeited," and the Court says:

"Therefore, even if the powers granted in the act of 1852 had been given to the Northwestern North Carolina Railroad Company, or the counties in its interest, subject to the 'same restrictions,' those powers would have expired by their own limitation long before their attempted exercise twenty-three years thereafter."

This language of the Supreme Court of North Carolina has no support in the ordinance of 1868 chartering the Northwestern North Carolina Railroad Company, or in the parts of the Act of 1852 referred to in the said ordinance. Section 12 of the said ordinance provides "that all counties or towns *subscribing stock* to said company *shall do so in the same manner and*

under the same rules, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company." This reference to the Act of 1852 incorporating the North Carolina and Atlantic Railroad Company is made only so far as the said Act of 1852 relates to the manner, rules, regulations and restrictions in *subscribing for stock*. It does not, by reference, make the *entire* Act of 1852 a part of the said ordinance, nor does it make the provisions of the Act of 1852 with respect to the corporate life and existence of the company a part of said ordinance; and the six years' provision in Section 45 of the Act of 1852 has no application to the Northwestern North Carolina Railroad Company.

Furthermore, this question of the corporate existence of the company is a matter which is expressly and specifically covered by other provisions of the said ordinance of 1868, and, under familiar and well settled rules of construction, the *express* and *specific* provisions of said ordinance would govern the railroad company created by the ordinance as to the matters thus expressly and specifically covered, even if the ordinance by preference made the *entire* Act of 1852 a part of the ordinance—and it does not. Section 1 of said ordinance expressly provides that the said company "shall have a corporate existence as a body politic *for the space of ninety-nine years*," and nowhere in the said ordinance is there any provision for any earlier termination of its charter, or for any forfeiture for not constructing this road.

Moreover, the said ordinance expressly provides for and contemplates the construction of the Northwestern North Carolina Railroad *by divisions*, and not necessarily all at one time, and there is no forfeiture pre-

scribed for failure to construct any one division, nor is there any forfeiture prescribed if the railroad company, after having constructed one division of the road, waits for a time before constructing another division.

Thus Section 5 of said ordinance provides that the said company shall proceed to construct said road, with one or more tracks, as speedily as practicable, in sections of five miles each, to the towns of Winston and Salem, in Forsyth county, which portion of said railroad when completed shall constitute its first division. Here, then, is a provision that the said railroad shall be constructed "as speedily as practicable, in sections of five miles each, to the towns of Winston and Salem," and that this portion of the railroad when completed shall constitute its "*first division.*" No express provision is made in the act as to when any other division of the road is to be completed. Even this division to Winston and Salem is to be completed only "*as speedily as practicable,*" and no forfeiture is provided even if this provision is not complied with.

It appears from the two Forsyth county cases *(Hill* and *Belo Cases)* that immediately upon its incorporation, in 1868, the railroad company began to obtain funds with which to construct its railroad to the towns of Winston and Salem, in Forsyth county. This division of the railroad was constructed. Suppose that it had happened afterwards that no further railroad had been constructed. Said ordinance is wholly silent as to any forfeiture of the charter for not constructing additional railroad. If the ordinance had intended to provide for any such forfeiture, doubtless it would have provided what was to be done with the railroad already constructed, whether that railroad was to be operated by the Northwestern North Caro-

lina Railroad Company, or whether it was to pass into the ownership of some other company.

The true view and the only view to be taken of this said ordinance on the point now under consideration, is that the Northwestern North Carolina Railroad Company might construct its road by sections or divisions from time to time, and that there was no forfeiture prescribed for any failure to complete the road to the terminus designated by Section 1, that is, some point on the northwestern boundary line of the State of North Carolina.

In addition to the foregoing views, it is to be observed that if the Northwestern North Carolina Railroad Company was liable to have its charter forfeited for not exercising its franchise and constructing its railroad to its whole extent, *this was a matter solely between the state and the railroad company*, and to be taken advantage of only by *quo warranto* proceedings There is no suggestion in the record that any such proceedings have been had or attempted. So long as the state permitted the road to exercise the franchises and powers conferred by the said ordinance, and failed to exercise any right of forfeiture, if any existed, it is not open to any county which, under the powers given by the said ordinance, had subscribed stock and issued bonds in aid of the construction of the said railroad, to say that the said charter was liable to be forfeited, and, therefore, the county bonds were invalid. This is a matter with which the county has no concern. Especially has the county no concern in this matter, where the admitted fact is, as in the present case, that the railroad actually was constructed in the county of Wilkes and the county obtained all the consideration which was contemplated for the issue of these bonds.

The authority to issue bonds is not only a power conferred upon the county or municipality, but a privilege of the railroad company.

On pages 12 and 15 of the record are Sections 12 and 13 of the charter, which give *this corporation* "power to construct branches of" the road, and conferred the authority and power given in Sections 33 and 34 of the Act of 1852, which are as follows (Record, p. 54):

"Chapter 136 of the Laws of North Carolina, Session 1852.

"SEC. 33. **Be it further enacted, That it shall be lawful for any incorporated town or county near or through which said railroad may pass to subscribe for such an amount of stock in said company as they shall be authorized to do by the inhabitants of said town or the citizens of said county, in manner and form as hereinafter provided.**

"SEC. 34. Be it further enacted, That the corporate authorities of such town, of the justices of the peace of such county, a majority of the justices of the county concurring, to make an order requiring the constable of such town and the sheriff of such county, at such time and on such notice as they shall direct, to open a poll and take the sense of the voters of such town qualified to vote for town officers, and of the voters of such county qualified to vote for members of the house of commons of the General Assembly, whether the officers of said town and the justices of the peace of said county shall subscribe to the stock of such company for such sum as the order shall propose, and the constable shall make return of the number against it, and the sheriff shall, in like manner, make return as to the vote in his county to the first court thereafter, to be held for such county and it shall be the duty of the sheriff to notify each justice of said county to attend at the court-house, to which he may make his returns of said poll."

In the case of the County of *Scotland vs. Thomas*, 94 U. S. Reports, on page 689, Justice BRADLEY says:

"The specific question in the present case, therefore, is whether the authority given the counties and towns in 1847 to subscribe to the capital stock of the Alexandria and Bloomfield R. R. Co. has become extinguished by the subsequent consolidation of that company with other companies, irrespective of the Constitutional provisions referred to."

Justice BRADLEY says, also, on page 688, after quoting the words of the Constitution of Missouri, similar to the words of the North Carolina Constitution of 1868, that "This prohibition, it will be observed, is against the Legislature's authorizing municipal subscriptions or aid to private corporations; *it does not purport to take away any authority already granted.*"

On page 693 Justice BRADLEY goes on to say: "But the case has other aspects, which it is necessary to take into consideration.

* * * * * *

"The project of the railroad promised a great public improvement, conductive to the interest of Alexandria and the counties through which it would pass." "The power was sought at the hands of the Legislature, and was given." "It was relied on by those who subscribed their private funds to the enterprise."

Speaking of this power he says: "Why it should not still attach to this portion of the road as one of the rights and privileges belonging to it, into whose hands soever it comes, by consolidation or *otherwise*, it is difficult to see. * * * Subscription to the stock *was not only a power of the county, but a privilege of the company.*"

This is the view taken of this question by BYNUM, Justice, in *Belo vs. Commissioners*, and FURCHES, Justice, in his dissenting opinion in *Commissioners vs. Call.*

These powers are not only conferred upon the Counties, but are privileges of the company, the North Western North Carolina Railroad Corporation. It follows, therefore, that Wilkes County was in "the same category" with Forsyth County.

The route of the road was determined by both the Legislature and the corporation. This was one of the privileges conferred upon the company, as said by Justice BRADLEY, in the case cited above, the *Thomas case*. And, besides, it is not for the County of Wilkes, which voted to issue bonds for a railroad by a certain route, to be heard to say, in a suit by an innocent bondholder, years after it was determined, that there was no power to construct a railroad by that route.

We do not understand that the Act of 1879, referred to by Justice HARLAN, to have been adjudged, for all purposes, null and void by the Supreme Court of North Carolina. Section 4 of the Act was adjudged void, but not Section 1. In the case of *Bank vs. Commissioners*, 119 N. C., 214, an act is expressly declared valid as a railroad charter, because the certification cannot be impeached by the journals, but, void as a taxing act, because, for that purpose, under the Constitution, it can be impeached by the same journals.

It is well settled, *in all courts*, that an act can be unconstitutional in part and constitutional in other respects. So, Section 1 of the Act of 1879 is valid, because, passed, in all respects, and certified, as required by the Constitution. See Act of 1879, and especially Section 5, &c., &c., where, upon its face, it is shown to *have been read three times and ratified*. The case of *Bank vs. Commissioners*, 119 N. C., 214, is decisive of this, being directly in point, and, indeed, is the case out of which all this litigation

has sprung. And, further, if the route was not a proper one, it was acquiesced in by the county when the company could have been forced by mandamus to have selected the proper one, or it could have been enjoined, anyhow, from constructing the road on the route determined upon.

Even if the journals of the General Assembly of North Carolina do not show that the Act of February 20, 1879, was passed in such a manner as to make that portion of the act which relates to the issuance of county bonds and levy of a tax comply with Section 14, Article II., of the Constitution of North Carolina, yet such omission on the journals does not render the entire Act of February 20, 1879, void; for those portions of said act which relate to the issuance of bonds and the levy of taxes therefor are separable, and may be stricken out without in any way interfering with Section 1 of said act, which provides for the construction of a railroad into Wilkes County by name.

The rule is well settled in North Carolina, as well as elsewhere, that, if a part of an act is unconstitutional and void; and, if the unconstitutional part of the act is separable from the remainder of the act, such unconstitutional part may be stricken out and the remainder of the act will stand as valid.

Applying this rule in the present case, it is obvious that Section 4 of the Act of February 20, 1879 (Record, page 15), which section provides that any

county, by vote of a majority of the voters, may subscribe for stock of the company and issue bonds in payment therefor and levy taxes to pay the same, is separable, and can be stricken out without doing any violence to the remainder of the act, and the remainder of the act may stand. The test in such cases is this: Unless it can be shown or presumed that the Legislature would not have enacted the valid parts of the act standing alone, without accompanying them with the enactment of the invalid parts of the act, then the valid parts of the act are separable and stand as valid. Let us apply this test in the present case. Section 1 of said Act of February 20, 1879, provides as follows (Rec., p. 14):

"That section thirteen of chapter seventeen of the ordinance of the convention of one thousand eight hundred and sixty-eight, ratified the ninth day of March, one thousand eight hundred and sixty-eight, be amended by adding the words 'and one of which shall be constructed from the towns of Winston and Salem, up the valley of the Yadkin by the way of Jonesville and Wilkesboro, in the county of Wilkes, to Patterson's factory, in the county of Caldwell, which branch shall be known as Second division."

Observe that this section is not anywhere connected with or made conditional upon the enactment of any other section of the said Act of February 20, 1879, and the reading of the other sections leads us to the same conclusion, namely, that said Section 1 is not connected with or dependent upon them. It cannot be said that the said Section 1 would not have been passed without the said Section 4. Said Section 1 is an authority to construct the railroad through Wilkes County, but the construction of such railroad is not mandatory. Section 4 is an authority to counties on

vote of the people to subscribe for the stock and issue bonds in payment therefor. It does not appear but that the Legislature would have given this authority to construct a road even though it had not given the authority to a county to issue bonds. On the contrary, it does appear that the authority is given to construct the road, and this authority is given unconditionally, although the Legislature knew that it might happen that no bonds would ever be issued by any county; for Section 4 is a mere *permission* and it did not appear at the time the act was passed whether or not any county would avail itself of the power. So that it stands demonstrated that the Legislature did in Section 1 intend to give the power to construct this road although no county bonds might ever be issued in aid of it.

Said Section 1, therefore, of the Act of February 20, 1879, is separable from the said Section 4, and stands as a valid enactment, although Section 4, which authorized a county to subscribe to the stock of the railroad company and to issue bonds therefore and levy taxes for this purpose, is stricken out because the act was not passed as required by Section 14 of Article II., of the Constitution of North Carolina, which prescribes how acts providing for the levying of a tax must be passed.

In support of the foregoing proposition, it is only necessary to refer to a few cases in the Supreme Court of North Carolina.

In *Rodman vs. Town of Washington*, 122 N. C., 39 (1898), an act levying a tax for school purposes was under consideration by the Court. It was admitted

that the said act, so far as the school tax was concerned, ought to have been passed in accordance with the requirements of Section 14 of Article II. of the Constitution of the State, and that the journals of the House and Senate ought to have shown the yeas and nays on the several readings, and that these provisions were not complied with. But the act also contained other provisions, not provisions for levying a tax, and in regard to those other provisions the Supreme Court of North Carolina in its unanimous opinion, said (page 41):

"It therefore follows as a logical deduction from what we have said that that part of said act authorizing the levy and collection of this special tax is unconstitutional and void, but it does not follow that the other parts and provisions of said act are void, and we do not understand that the learned Judge who tried the case below so decided (*Russell v. Ayer*, 120 N. C., 180; *Gambill v. McCrady*, 75 N. C., 509)."

See, also, to the same effect, *Union Bank of Richmond vs. Commissioners of Oxford*, 119 N. C., 214 (1896), where that Court, while holding that an act was void so far as the creation of indebtedness was concerned, apparently recognized that the act might be valid as a railroad charter.

If, therefore, in addition to the said ordinance of March 9, 1868, any further legislation was necessary making a definite location of the route of the railroad near or through Wilkes County before said railroad could be constructed there, then said further legislation was had in Section 1 of the Act of February 20, 1879; and after the passage of the said Section 1 of the Act of February 20, 1879, there could be no possible question of the right of the railroad company to proceed to construct its road through Wilkes County

in accordance with the general route prescribed in section of the ordinance of 1868. In any view, therefore, when said Section 1 of the Act of February 20, 1879, was passed, Wilkes County was a county "near or through" which said railroad might pass and was authorized on the vote of its qualified voters being had, to subscribe to stock of the railroad company and to issue bonds of the county therefor.

We notice in the argument of the learned counsel for the county that the answer he makes to the proposition that Section 1 of the Act of February 20, 1879, is valid and authorized the construction of the road there, is that so to hold would be in effect and indirectly over-riding the provision of Section 14 of Article II. of the Constitution, and that it is not permissible to do indirectly what can not be done directly.

The reply to such an answer is obvious. The ordinance of March 9, 1868, was the enactment which authorized the subscriptions to capital stock of the railroad and the issuance of county bonds therefor. This enactment, together with the Act of 1852, by reference made part thereof, authorized counties "near or through" which said railroad might pass to subscribe for stock and to issue county bonds therefor and levy a tax for the payment thereof. These provisions were all complete in the said ordinance of March 9, 1868, and needed no further legislation. The general route of the railroad was also complete in Section 1 of said ordinance of 1868, and this general route took the railroad "near or through" Wilkes County. Here then was complete authority to make a subscription to the capital stock, to issue these bonds and levy taxes in

payment therefor, and so far as these are concerned, no further legislation was necessary.

It cannot be claimed that the people of Wilkes County were taken by surprise in the matter of the authority to issue these bonds, for this ordinance of 1868, which the Supreme Court of North Carolina has held remained in full force and effect after the Constitution of 1868 was adopted, made express provision for the issuance of bonds by any county near or through which the railroad described in Section 1 of the said ordinance might pass, that is, made express provision for the issuance of bonds by Wilkes County. This ordinance was continued in force by the Constitution and after the Constitution was adopted, as was held in the *Hill case* and *Belo case*. Therefore, no purpose of Section 14 of Article II. of the Constitution of preventing surprise in tax matters or preventing such matters going through without consideration can be urged as against these provisions of the ordinance of 1868.

The express authority to issue these bonds of Wilkes County had been given in the ordinance of 1868. After the passage of that ordinance, it was no longer a question whether or not Wilkes County had the power under existing law, namely, that ordinance, on the vote of the people to issue these bonds in aid of this railroad *at some time or other*. At the very utmost, all that could be claimed would be that some further legislation was necessary making a *more definite location* of the railroad before the company was authorized actually to build the railroad near or through Wilkes County. Although, as we have shown above, any such claim is utterly without foundation, yet in order to meet even this unfounded claim, we say that if any

such further legislation was necessary before the railroad company could proceed with the construction of its railroad in, near or through Wilkes County, *then such further legislation was had in Section 1 of said Act of February 20, 1879. This legislation in said section was not legislation authorizing Wilkes County to issue bonds, but was merely legislation relating to the more definite location of the railroad.*

The Code of North Carolina contains general provisions authorizing counties to subscribe for stock and to issue bonds in aid of the construction of railroads, and such legislation is required by Section 14 of Article II. of the Constitution of North Carolina to be passed with certain formalities. Of course, before any of those provisions of the Code can have effect, there must be a railroad company either in existence or in process of formation, the stock of which can be subscribed for, and such company must have charter authority to construct a railroad. But it could not for a moment be contended that the same formalities were required by Section 14 of Article II. of the Constitution of North Carolina in the incorporation of such railroad company and in the giving of legislative authority for the construction of its road as are required for the enactment of the general provisions of the Code relating to county subscriptions to railroads and the issuance of county bonds therefor. The incorporation of the railroad and the authority to construct the railroad is one thing and an entirely different thing from the authority to issue county bonds.

So in the present case, the authority to issue these bonds was given in the ordinance of 1868, the authority being conferred upon any county "near or through" which the railroad described in Section 1 of said ordi-

nance might pass, and such railroad according to the general description in said Section 1 of the ordinance at the very least might pass "near or through" Wilkes County. The authority, therefore, to issue these bonds was complete in the ordinance of 1868.

When Section 1 of the Act of February 20, 1879, was enacted, it did not give any authority whatsoever to issue these bonds, if that authority did not exist before. If the railroad described in Section 1 of the ordinance of 1868 might not pass near or through Wilkes County, then the said ordinance of 1868 gave no authority to issue these bonds, and no provision of Section 1 of the Act of February 20, 1879, locating more definitely the route, could give any such authority. In other words, the authority for the issuance of these bonds is complete under the said ordinance of 1868. Section 1 of the Act of February 20, 1879, not only did not but could not add to this authority.

II.

There was lawful authority for the issue of these bonds in the present case UNDER THE CODE, **sections 1996 to 2000. These sections of the Code were originally adopted as the act of April 10, 1869. They were afterwards adopted as sections 1996 to 2000 of the Code of North Carolina of 1883. It is admitted by all that these sections of the Code, 1996 to 2000, were adopted in accordance with the constitution as respects the three several readings and the entry of yeas and nays upon the journal, etc.**

The said act of April 10, 1869, as well as said sections of the Code 1996 to 2000 are printed in full in the Appendix at the end of this Brief.

The Supreme Court of the United States were careful in answering the first question (180 U. S.) to say that the Federal court should follow the decisions of the State Supreme Court as controlling upon the inquiry whether legislative enactments of 1868, 1879 and 1881 were passed in such manner as to become, under the constitution, laws of the State, and thus the Supreme Court limited the effect of these decisions of the State Supreme Court to the point whether they had become laws of the State under Article II., Section 14, of the constitution. [Text of said Section 14, see Appendix to this Brief.] The Supreme Court of the United States, by thus carefully limiting its answer to the first question, has, in effect, stated that these decisions of the Supreme Court of the State of North Carolina, as to the *construction* of

these sections of the Code, are not to be controlling in the Federal courts, and hence the general rule applies that the Federal courts should follow the decisions which were in existence when the bonds were issued, if there any, or, if not, then they should consider the questions for themselves, and they are not bound by by any subsequent decisions of the State Supreme Court.

Hence, decisions of the Supreme Court of North Carolina, *construing* the Code made *after* the bonds in question were issued, do not bind the Federal courts, if such subsequent decisions of the Supreme Court of North Carolina are not in accordance with the general principles of jurisprudence, but the Federal courts may, and should, exercise their own independent judgment. There is a long line of decisions to that effect in the Supreme Court of the United States, and these decisions relating to the construction of statutes are expressly recognized and distinguished by the Supreme Court of the United States in its opinion (see *Wilkes County vs. Coler*, 180 U. S., 506-531).

It will be noticed that on page 519 of the case last cited, this Court says, referring to the acts of 1868, 1879 and 1881, as follows:

> "Observe that the issue is not as to the construction, meaning or scope of a statute, but whether that which purports to be a legislative enactment ever became a law for any purpose."

Under this decision of the Supreme Court of the United States, the Federal Courts are, of course, not bound by the decisions of the Supreme Court of North Carolina construing the Code *after* the bonds were issued.

A vote of the qualified voters of the county was had as required by the Constitution and by these Code Sections 1996-2000.

These sections of the Code required an election and "a vote of the majority of the qualified voters" (see Constitution, Art. VII., Sec. 7, in Appendix to this Brief) of the county in favor of the proposition of subscribing the stock and issuing the bonds. This provision was complied with in the case of this present issue of bonds.

THE BOND recites it (Record, p. 16).

THE COMPLAINT (paragraph 22, Record, p. 7) alleges compliance.

THE ANSWER of the county commissioners (paragraph 24, Record, p. 27) also admits compliance with this provision of the Code.

The recital in the bond is that the bond is (Record, p. 16):

"Authorized by a vote of the majority of the qualified voters of Wilkes County by an election regularly held for that purpose, on the 6th day of November, A. D. 1888."

Said bonds recite that they are issued by authority of the act of February 20, 1879. But the recital of the act (if that act of February 20, 1879, be held not to give authority) would not invalidate the bonds, or render ineffective the recital of the vote, if they were, in fact, authorized by some other act, as sections 1996 to 2000 of the Code, now under consideration. See the opinion of this Court in this very case on the former hearing in this Court, *Wilkes County vs. Coler*, 180

U. S., 506, 524-525; *Evansville vs. Dennett*, 161 U. S., 434; also see *Anderson County vs. Beal*, 113 U. S., where the wrong act was recited. In that case, notwithstanding the bonds recite the wrong act, the Court held, as respects the recital of the election, as follows, to wit (p. 239):

"In view of all this, the statement by the commissioners in the bond that it is issued 'in pursuance to the vote of the electors of Anderson county of September 13, 1869,' is equivalent to a statement that 'the vote' was a vote lawful and regular in form, and such as the law then in force required in respect to prior notice."

This recital, therefore, of the election in this Wilkes County bond is a recital of an election under sections 1996 to 2000 of the Code, and is conclusive in favor of the *bona fide* holders of these bonds, as was held in *Wilkes County vs. Coler*, 180 U. S., 506, 524, 525, and in the said case of *Anderson County vs. Beal, supra.*

Sections 1996 to 2000 of the Code do not violate Article 5, Sections 6 and 7, of the Constitution as to "Special purpose," "Special object" or "Special approval" of the General Assembly.

Said Sections 6 and 7, Article 5, of the Constitution are as follows:

SECTION 6. "The taxes levied by the Commissioners of the several counties for county purposes, shall be levied in like manner with the State taxes, and shall never exceed the double of the State tax, except for a special purpose, and with the special approval of the General Assembly."

SECTION 7. "Every act of the General Assembly levying a tax, shall state the special object to which it

is to be applied, and it shall be applied to no other purpose."

It was objected by the State Court in the case of *Commissioner vs. Call, supra*, and in *Commissioners of Stanly County vs. Snuggs*, 121 N. C., 394, 400, 401, cited in the *Call Case*, page 323, that these provisions of the Code are a *general* act, and that, because this is a *general* act as distinguished from a *special* act, it violates Article V., Sections 6 and 7, of the constitution, which provides, in substance, that taxes levied by the commissioners of the several counties for county purposes shall be levied in like manner as the State taxes, except for a special purpose, and with the special approval of the General Assembly, stating the special object to which the tax shall be applied.

(a) **In the present case, however, there is not a word or a syllable in this record to show that the county tax necessary for these bonds would exceed double the State tax; therefore, the question does not arise.**

(b) **If, however, it had been shown in the record in this case that the county tax for these bonds might exceed double the State tax, then these bonds are, nevertheless, valid:**

First, because the Code does not violate the provisions of Article V., Section 6 and 7, above referred to. The constitution only requires that the Legislature give

special *approval* to the special *purpose* for which any tax is levied in excess of the rate named, but such special approval may be given to all the counties, as well as to any one county, the object of the provision of the constitution being to require the special assent of the Legislature to the special *purpose*. If the rate referred to in Article V., Section 6, is to exceed the double of the State tax, this section requires the Legislature to specify the special purpose for which it may so exceed the State tax. The Legislature could not authorize such excess by an Act, *general* or special, which only named "*county*" *purposes* generally, and did not specify the special or particular purpose, but it is not necessary that the Legislature should in each instance specify by name any particular county or counties. The specification required is only a specification of a special purpose.

Legislative authority to subscribe for the stock in a railroad company and issue bonds in payment of such subscription is a *special purpose* within the meaning of this section, and so the sections of the Code, 1996 to 2000, being the Act of April 10, 1869, do specify the special purpose for which the tax is to be levied. It is not necessary to name by name each particular county. If these sections of the code had provided that the county commissioners of the county, A, B, C, D, etc., naming all the counties in the State, should have power to subscribe for stock in any railroad company, etc., obviously this would be good, for the very Section 6, Article V., of the constitution, referred to, contemplates that such taxes may be levied by all "the several counties" of the state. The constitution does not say that any special act is required, but only requires that the purpose be specified, and that the

tax and the purpose have the special approval of the General Assembly.

The propositions of the Supreme Court of North Carolina on this point seems to be, in effect, that if the legislature passes a special act for each county in the state; that is to say, ninety-five acts, each act exactly alike, except that one act applies to one county and another to another, and so on through all the ninety-five acts, the legislation is good; but if the legislature, instead of doing this, enacts precisely the same act and says that this act shall apply to all counties in the state, then such an act is bad. Such a view is, of course, unsound, and, if that be the view of the state Supreme Court, the federal courts cannot be expected to follow it as to negotiable bonds issued before such state decision was made.

AND, SECOND, *however this point may be decided, a ruling one way or the other would not invalidate these bonds. A bond may be a valid obligation, although there is not sufficient tax to pay it.*

Such bonds could be paid by as much tax as could be levied, and, if at any time the legislature did pass a special act giving its special approval to the levy of a further tax, then the defect of a lack of power to tax would be removed, if such defect existed. Therefore, on this point, the objection raised by the Supreme Court of North Carolina must fall. That there may be bonds which are valid, although there is a tax-rate limit, is well settled (see *United States vs. Macon County*, 99 U. S., 582). Article V., Section 6 of the Constitution of North Carolina is a mere limitation

upon the tax rate, such as was involved in this case of *United States vs. Macon County*, just cited. Under the decisions of the Supreme Court of North Carolina this constitutional provision does not affect the validity of the bonds, and in no view of the case could affect more than the method of having a valid, existing and binding obligation *paid*.

"The legislative practice has uniformly been, as far as we know, to give approval in advance, and thus confer the requisite legal authority to levy special taxes beyond the assigned limits, though if given after the levy, it would doubtless be equally effectual" (*Cromartie vs. Commissioners*, 87 N. C. Reps., on p. 140).

And in *Herring vs. Dixon*, 122 N. C., on page 423, the Supreme Court of North Carolina again distinguishes between the power to contract a valid indebtedness without special legislative sanction and the power to levy a tax to pay said indebtedness when it says:

"In *Vaughn vs. Commissioners*, 117 N. C., 429, while it was held that the commissioners could *incur a debt* for necessary expenses, without a vote of the people, it was not held that they could *levy a tax* in excess of the constitutional limit to pay it without special approval of the Legislature."

So under the rulings of *Cromartie vs. Commissioners* and of *Herring vs. Dixon*, the commissioners have the right to contract a valid debt without a special act, but only the process of collecting its payment would be affected by Section 6, Article 5, of the Constitution.

But this argument is unnecessary, as the record contains no evidence whatever that the payment of this obligation by the county will require a tax exceeding double the State tax.

FURTHERMORE, THIRD, *even if there be this tax-rate limit in Article V., Section 6, of the constitution of North Carolina, that is a mere limit. It does not appear as a matter of law on the face of the constitution, or on the face of these sections of the code, or on the face of these bonds, that in the instance of these particular bonds of Wilkes county the tax-rate limit would be exceeded. Whether or not this tax-rate limit would, as a fact, be exceeded, is a matter in pais, of which the holder of a negotiable bond, like the bonds in question in the present case, is not bound to take notice.* Moreover, as above stated, there is no proof in the present case that the county tax for these bonds would exceed double the state tax.

The sections of the Code 1996-2000 are prospective in their operation, and they are not limited to any railroad which had been begun either before the Constitution of 1868 was adopted or before the adoption of these sections of the Code by the Act of April 10, 1869.

The language of section 1996 of the Code is: "The Board of Commissioners," etc., "*shall have* power to subscribe stock," etc., "to aid in the completion of any railroad in which the citizens of the county *may have* an interest." *All this is future.* It applies to any railroad in which the citizens of the county may have an interest, either when the act was adopted *or at any time afterwards.* There is nothing in this language which restricts the operation of the act either to the time of the adoption of the constitution of 1868 or to

April 10, 1869, the time of the first enactment of the statute which became these provisions of the Code.

Any of the recent decisions of the Supreme Court of North Carolina contrary to the propositions here stated are wholly indefensible, and have no support in the language of these sections of the Code. Inasmuch as all of these decisions were rendered *after* these bonds were issued, they are not binding upon the Federal Courts (see the decision in this case on questions certified, *Wilkes County vs. Coler*, 180 U. S., 506, 531; and see also *Folsom vs. Ninety-six*, 159 U. S., 61, *supra).*

"No statute should be given a retrospective operation unless its words expressly require such construction" *(State vs. Littlefield.*, 93 N. C., 614).

What words in Section 1996 require that its operation be referred back to the date of the adoption of the Constitution, April, 1868, fifteen years before it was re-enacted in the Code of 1883, and one year before it was put in any shape on the statute books of North Carolina? Upon the same false principle of construction (a principle that can find no support in any book ever written on the subject), if section 1996 should be re-enacted in the Code of 1900, it would have no application to any road that might be built during the next century, but would apply to roads incomplete in the year 1868, thirty-two years before its enactment.

But this very principle for which we contend has been passed on by the Supreme Court of the United States in *James vs. Milwaukee*, 16 Wall., 159. In that case a statute authorized a city to lend its credit to any railroad company incorporated and organized; and this Court held that companies thereafter organized

were intended to be included, and the statute was applicable to them, as well as those then in existence. This Court said (pp. 160, 161) :

"The defendant in error insists that the power conferred was confined to companies already in existence at the date of the act, and such was the opinion of the court below. We entertain a different opinion."

In that case, there was no word denoting the future tense, no "shall," as in Section 1996, but the only words used were the adjectives, "incorporated and organized."

Erroneous Construction of the Word "Completion" in Section 1996 of the Code, by the Supreme Court of North Carolina in its Late Decision in the *Stanly County Case*, 121 N. C., 394, 1899.

[For text of Sections 1996–2000 of Code, see Appendix to this Brief.]

The Supreme Court of North Carolina, at this late day, in *Commissioners of Stanly County vs. Snuggs*, 121 N. C., 394, has taken a very narrow view of the word "completion." It has undertaken to say that these sections of the Code refer only to a railroad which had been begun, and that the word "completion" is not synonymous with "construction," but that the language here requires that there must have been an unfinished road.

The Court went further, and held that there must have been a road unfinished *at the time of the adoption of the constitution*, April 24, 1868, in order that these sections of the Code might have application. This in-

terpretation of the word "completion," we submit, is not the correct one.

It seems obvious that it is used as synonymous with the word "construction." This view is supported by the obvious difference between this language and the language used in the State Constitution as respects the issue of State railroad aid bonds. Article V., Section 4, of the Constitution prohibits the issue of State railroad aid bonds, "except to aid in the completion of such railroads as may be *unfinished at the time of the adoption of this Constitution.*" Section 1996 of the Code, adopted April 10, 1869, about one year after the framing of this provision of the State Constitution, omits the significant words—namely, "unfinished at the time of the adoption of this constitution." On no possible theory can these words be read into the statute. The Legislature did not put them there, and the Courts cannot put them there.

Erroneous Construction in the *Stanly County Case* by the State Supreme Court of the Words "any Railroad in which the Citizens of the County May Have an Interest," in said Section 1996 of the Code.

The Supreme Court of North Carolina held that the words of Section 1996 of the Code, "the citizens of the county may have an interest," do not mean exactly what they state, but hold that they require that the county, *as a county*, shall have a *pecuniary* interest in the railroad, in order that Section 1996 may apply to it. On this point it seems only necessary to state that no such words occur in Section 1996. This construc-

tion by the Supreme Court of North Carolina takes out the words "*the citizens*," and inserts the word "*pecuniary*," and thus it holds that the words "any railroad in which the citizens of the county may have an interest" are to be construed as follows, to wit; "Any railroad in which the county has a pecuniary interest." A mere statement of such a distorted construction of this language of the Code is enough to refute any such construction.

Here, too, again we may call the attention of this Court to the language of Article V., Section 4, of the Constitution of the State of North Carolina when it was dealing with the question of the right of the State to issue railroad aid bonds. There it refers to a railroad "in which the State has a *direct pecuniary interest*." [For text of said Section 4 see Appendix to this Brief.] This Section 1996 of the Code was adopted about one year after the said Article V., Section 4, of the Constitution. Doubtless the legislators had before them this provision of the constitution, or, at least, were familiar with it. The difference in the language was obviously intentional and significant.

The history of the adoption of this provision of the State Constitution (Art. 5, Sec. 4) as to State Railroad Aid bonds shows that it had a different purpose from that of the Code (§§ 1996-2000).

What is now Section 4 of Article V. of the Constitution was originally reported to the Constitutional Convention of 1868 by the Committee on Finance as follows:

"Until the bonds of the State shall be at par, the General Assembly shall have no power to contract any new debt or pecuniary obligation in behalf of the State, except to supply a casual deficit, or for suppressing invasion or insurrection, unless it shall in the same

bill levy a special tax to pay the interest annually " (Journal, p. 354).

An amendment was proposed as follows :

" And the General Assembly shall have no power to give or lend the credit of the State in aid of any person, association or corporation, except to aid in the completion of such railroads and other works of internal improvements as are unfinished, and in which the State has a direct pecuniary interest, unless the subject be submitted to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon " (Journal, p. 354).

This proposed amendment was further amended as follows :

Mr. Tourgee moved to amend by striking out " are ' in the fifth line and inserting " may be ; " insert after the word " unfinished " in the fifth line " *at the time of the adoption of this constitution.*" Strike out " and " in the fifth line and insert " or." This amendment of Mr. Tourgee's was accepted, and the proposed amendment, as amended, was adopted (Journal, p. 354).

On pages 85 to 90 of the convention journal is a report made January 29th, 1868, by the Treasurer of the State to the president of the convention as follows :

" SIR—I have the honor, in response to the resolution of your honorable body requesting me to furnish the convention a " statement of the indebtedness of the State, to what parties or sources, what amount to each, what is the amount of her endorsement for railroad or other improvements, what further endorsement of railroad bonds she is directed to make under any existing law or regulation, and, when passed, what property, or assets, or securities, said State holds for or on account of said indebtedness, what amount of stock the State holds in the several corporations of this State, and what amount of dividend or interest she receives annually from each source.'" * * *

The report of the State Treasurer shows that, prior to the meeting of the convention, the State had undertaken to issue its bonds in aid of certain railroads, and that, under the statutes then existing, the State was liable to be called upon for the issue of additional bonds, or for the guaranty and payment of additional bonds, and the State owned stocks in certain railroads, thus having a direct pecuniary interest in them. The amendment made to Section 4, Article V., of the Constitution above quoted was designed to enable the State, *without a vote of the people*, to carry out its contracts already entered into on railroads, &c., already then begun and to protect its interests in the railroads, &c., already begun. *With a vote of the people* the State was allowed to aid railroads without restriction.

As the Constitution, Article VII., Section 7, did not allow counties to incur any debt in any case (except for necessary expenses) without a vote of the people, the reason for the provision as to *unfinished* railroads in case of State aid, did not apply to counties, and was purposely omitted in the Act of April 10, 1869 (now Sections 1996-2000 of the Code).

Our view is supported by the following decision rendered by the North Carolina Supreme Court in 1869, the year following the Constitutional Convention.

In *Galloway vs. Chatham Railroad Company*, 63 N. C., 147, the suit was to enjoin an issue of State bonds in aid of a railroad company. The Court held that the bonds were unauthorized under the provisions of the constitution. In the course of the opinion (PEARSON, C. J., giving the same) the Court say, with

respect to the restrictions on the power of the State to incur debt, speaking of the debt existing at the time of the adoption of the Constitution of 1868 (p. 153):

"It will be found that most of the public debt was incurred in three modes: 1st, by subscribing for stock in railroad and navigation companies, and issuing bonds to pay for the stock, the state becoming a member of the corporation; this is the heaviest item, and amounts to, say, eight millions of dollars; 2nd, by issuing bonds of the state and exchanging such bonds for a like amount of the bonds of the corporation, the state not becoming a stockholder and taking collateral security of more or less value; this is the next heaviest item and amounts to about three millions of dollars; 3d, by endorsing the bonds of corporations and taking a mortgage or some other collateral security; this item amounts to about two millions.

"These are the three modes by which, judging from the past, it was apprehended the public debt might be so run up as to ruin the credit of the state and tarnish her honor and her reputation for good faith.

" * * * (p. 155. The suggestion that the credit of the state was given by this statute to aid in the completion of an *unfinished railroad* was not strongly urged on the argument, and, indeed, it could not be. An unfinished road is one that has been begun and partly worked on, and such a road is made an exception, on the ground that it might be proper to finish it in order to prevent a sacrifice of the work that had been done. There is no evidence that such was the fact in regard to this road. The other suggestion, that the state has a direct pecuniary interest in this road, was properly abandoned. The word '*has*' is in the present tense. The exception is obviously confined to roads in which the state had a direct pecuniary interest at the time of the adoption of the constitution; otherwise the state might, by a subscription for stock, become directly interested in every railroad or navigation scheme that should thereafter be projected, and thus the restrictions of the constitution would be of no effect whatever."

Note the difference between the language of the Constitution (Art. 5, Sec. 4) as to *State* aid bonds and the language of the Code as to *county* aid bonds. The Con-

stitution says "*has*," and note the comments of the Court on the present tense. The Code says "*may have*," &c., &c.

Of course, such of these decisions of the Supreme Court of North Carolina as were rendered after the bonds in question in the present case were issued are not binding upon this Court, and it is both the right and duty of this Court to construe this language of Sections 1996–2000 according to their natural and proper meaning.

Observe that the language of Section 1996 of the Code is not any railroad in which the *county* may have an interest, but any railroad in which *the citizens of* the county may have an interest; and therefore any financial interest of the county itself as a corporate body in the railroad, which is contended for by the learned counsel for the county, is utterly out of the question. Any such construction disregards the words "the citizens" and strikes them out of the statute.

The interest which Section 1996 of the Code contemplates that the citizens of a county may have in a railroad to be aided is clearly not a financial interest as stockholders. It would be the height of absurdity to suppose that this section of the Code meant that ALL *the citizens of the county must be stockholders* in a railroad, and thus have a financial interest in the railroad as a condition precedent to the county subscribing stock to the company. What an absurdity to suppose that this section of the Code contemplated that every man, woman and child in the county should own stock in the railroad company before the county could subscribe stock to the company.

Neither can Section 1996 of the Code contemplate that it is necessary that *some* citizens of the county

have a financial interest in the railroad *as stockholders* as a condition precedent to the county subscribing stock to the company. If this section read in this way, then if *some* citizens of the county owned stock in a railroad company which did not touch the county, and which was fifty or a hundred, or even two hundred miles distant from the county, nevertheless the Section 1996 of the Code so construed would give power to the county to subscribe to the stock.

None of these absurdities was intended by said Section 1996 of the Code. The word "interest" in this section must be construed in a rational way with reference to the subject matter, and when it is so read, it is clear that the interest spoken of is **the interest that the citizens of the county might have in any public improvement.**

"What else does this doctrine mean, if not that building a railroad, though it be built by a private corporation, is an act done for a *public use?* And the reason why the use has already been held a public one is that such a road is a highway, whether made by the government itself or by the agency of corporate bodies, or even by individuals, when they obtain their power to construct it from legislative grant" *(Olcott vs. Supervisors*, 16 Wallace, 678).

Within the meaning of Section 1996 of the Code the citizens of a county have an interest in any railroad running near or through the county, and this section would be confined accordingly to *such* railroads.

Even if the language of these sections of the Code—1996 to 2000—is to speak from the time of their earliest adoption—to wit, April 10, 1869—and if these sec-

tions are not prospective in their operations, they, nevertheless, authorized the issue of the bonds now in suit by Wilkes County, as they were issued in aid of a railroad which had been begun before April 10, 1869, and was then not completed.

There cannot be the slightest foundation in this language of Section 1996 of the Code for saying that it applies only to the completion of a railroad which had been begun *when the Constitution of 1868 was adopted.* There is not a word or a syllable in the said provisions of the Code lending any support to any such view. The utmost that could be claimed would be that these sections applied to the completion of a railroad which had been begun at the time these sections were adopted, which was in 1883, or, at the very earliest, April 10, 1869.

Even if this earlier date, April 10, 1869, be the one selected, then it is, nevertheless, true that these sections of the Code would apply to and authorize these Wilkes County bonds, since this railroad might be a railroad referred to in these sections, and these sections might properly speak of the subscription to the stock of this railroad company as necessary to aid in the completion of this railroad.

This company had been chartered by the ordinance of the Constitutional Convention, ratified March 9, 1868, over one year before the passage of these Code sections. Section 1 of the ordinance of March 9, 1868, authorized the construction of the *main line* into Wilkes County. A glance at the map will show this.

The line into Wilkes County was not a *branch* as erroneously contended by counsel on the other side. Forsyth County, as shown in the two Forsyth County cases, *Hill case and Belo case*, above quoted, had in 1868 issued bonds to aid in the construction of this road, such bonds being ordered issued at the June Term, 1868, of the Board of Commissioners of Forsyth County.

Furthermore, the affidavits printed in the Record, pages 65 *et seq.*, show that the work had been begun on the Northwestern North Carolina Railroad in October, 1868.

This is also conclusively shown by the North Carolina Act, ratified August 21, 1868, which the counsel for the county has been kind enough to print in his brief, page 9, entitled, "An act to amend an ordinance of the Convention entitled 'an ordinance to incorporate the Northwestern North Carolina Railroad Company.'" This act, passed in the August succeeding the adoption of the Constitution, authorizes *State* aid "for the purpose of aiding in the construction of the Northwestern North Carolina Railroad from Salem, in Forsyth County, to Mount Airy, in Surry County," without any vote of the people of the State, as required by the Constitution, Article V., Section 4 (reprinted in the Appendix of this Brief). This section of the Constitution provides:

"The General Assembly shall have no power to give or lend the credit of the State in aid of any corporation except to aid in the completion of such railroads as may be unfinished at the time of the adoption of this Constitution, or in which the State has a direct pecuniary interest, unless the subject be submitted to a direct vote of the people of the State and be approved by a majority of those who shall vote thereon."

This Act of August 21, 1868, undertakes to give such State aid, which it would have been impossible legally to give if the said Northwestern North Carolina Railroad had not been a railroad which at the time of the adoption of the State Constitution was an "unfinished" road; that is, begun and not finished, or one in which the State had a direct pecuniary interest, the latter of which we do not understand to be claimed by any one to be the case. The whole Act of August 21, 1868, therefore, proceeded upon the assumption that the said road was then a road which, in the language of the Constitution, was "unfinished" at the time of the adoption of the Constitution.

The same thing is true of the *Act of February 3, 1869*, printed in the brief of counsel for the county, page 10.

Furthermore, the *Ordinance of March 9, 1868*, adopted by the constitutional convention, expressly provides in Section 8 for State aid to this Northwestern North Carolina Railroad Company, and the said ordinance itself was adopted before the adoption of the Constitution, thus showing that the railroad was an "unfinished" road within the meaning of the Constitution at the time of the adoption thereof.

This railroad, then, was a railroad projected and begun and under construction at the time of the adoption of these sections of the Code, April 10, 1869. Obviously, therefore, these sections of the Code apply to this issue of bonds by Wilkes County to aid "in the completion" of such railroad.

Even if, however, the word "completion" mentioned in the Code refers to the completion of a railroad which had been begun at the time when the county voted to subscribe to stock and to issue bonds, then clearly under

such an interpretation this railroad was within the language of the Code, for it is clear that this railroad had been begun and completed to Winston long before 1888 when the vote was taken by the county on the issuance of these bonds.

See the order of the board directing the issuance of the bonds and its recitals, Record, page 42; see, also, Record, page 65 et seq.

The County is Estopped by the Recitals in the Bonds.

Inasmuch, however, as these sections of the Code—1996 to 2000—gave lawful authority to issue bonds to aid in the completion of a railroad, there was, under the familiar doctrine, *power to issue bonds*, under some facts and circumstances; and whether or not all of the facts and circumstances existed, such as that the railroad had been begun and was unfinished at the time of the adoption of the Constitution in 1868 or of this act, April 10, 1869, or at the date of the vote of the people of the county, is a matter *in pais* to be determined by the County Commissioners before the bonds are issued; and inasmuch as they have issued these negotiable bonds, and they are in the hands of *bona fide* holders, such holders are entitled to assume that they have been issued under and pursuant to the power which existed. This is under the familiar rule that, if upon any state of facts there was lawful authority to issue negotiable paper, then the holders of such negotiable paper are entitled to assume that such facts existed. The cases to that effect in this Court are so numerous and so well known to this Court that we need not cite them here.

See further on this point *(ante*, pp. 47–51, 89).

No "policy" of the State against Railroad Aid Bonds. Provision as to "unfinished" railroads applies only in case of State aid bonds, not county aid bonds.

The learned counsel for the county (Brief, p. 34) has attempted to make an argument that there was a *policy* of the State of North Carolina, as evidenced in the constitution of that State, adopted in 1868, against issuing railroad aid bonds by either the State or counties, except in aid of roads which were unfinished at the time of the adoption of the constitution. There was no such policy. The policy was just the contrary. The policy was this—that no State bonds should be issued to aid any *new* railroads, unless there should be a vote of the people, but with such a vote the State could aid any railroad, whether it had been begun or not at the time of the adoption of the constitution. If the railroad had been begun and was unfinished at the time of the adoption of the constitution, State bonds might be issued in aid thereof without any vote of the people.

As to counties, there was no distinction made as to whether the road was finished or unfinished at the time of the adoption of the constitution. A vote of the people of the county was required by the Constitution for the issuance of railroad aid bonds of a county in either case, whether a road had been begun or was a new railroad, and there was absolutely no distinction whatever made in the constitution between new roads and unfinished roads so far as respects county aid, and no such distinction existed in the Code, or in any other provisions of the statute.

Even the learned counsel for the county would admit that if there had been a special act authorizing the issue of these bonds, or if the Act of February 20, 1879, had been properly enacted by the Legislature, there would have been clear constitutional power to issue these bonds. How, then, can the learned counsel seriously argue that the Constitution of the State of North Carolina has adopted any policy as against the issue of county railroad aid bonds.

Further, as to Code Sections 1996-2000. These sections give power to issue the bonds. The objections of the County further answered.

The learned counsel for the county, in his argument in this case (Brief, pp. 31, 33 *et seq.*), in substance says, in regard to the Code provisions, Sections 1996 to 2000, originally adopted April 10, 1869, these are to be construed the same as the provisions in the Constitution of the State, Article V., Section 4, in regard to the issue of railroad aid bonds by the State. There is not anything in the Code or in any of the statutes or in the Constitution of the State which supports any such view. The insignificant language of Article V., Section 4, of the Constitution of the State, as applied to *State* railroad aid bonds, is purposely omitted when the Constitution deals with *county* bonds in Article VII., Section 7, and is purposely omitted from the said provisions of the Code.

The Supreme Court of North Carolina, in *Commissioners of Stanly vs. Snuggs*, 121 N. C., 394, committed an obvious and glaring error in holding that the same provision applied to a *county* as to a *State*.

We may note in passing that the learned counsel for the county, in dealing with Article V., Section 4, of the Constitution of North Carolina in connection with his argument in respect of Code Sections 1996 to 2000, would omit the significant words "*a direct pecuniary*," so that he would make a clause in that section, as respects State aid, read "a railroad which may be unfinished at the time of the adoption of the constitution, or in which the state has *an interest*," whereas that section of the Constitution really reads, "except to aid in the completion of such railroad as may be unfinished at the time of the adoption of this constitution, or in which the state has a *direct pecuniary* interest, unless the subject be submitted to a direct vote of the people of the state," etc. The claim of the learned counsel—that a "direct pecuinary interest" is required in the case of *county* bonds—is erroneous, and the late decision of the Supreme Court of North Carolina in the case of *Stanly County vs. Snuggs*, 121 N. C., 394, is plainly erroneous.

The learned counsel for the county speaks of the case of *Stanly County vs. Snuggs*, 121 N. C., 394, and says, in substance, that in that case the words in Code Section 1996, Act of April 10, 1869, "in the completion of any railroad in which the citizens of the county may have an interest" were construed as speaking of railroads *unfinished* at the time of *the passage of the act or the adoption of the constitution*. The fact is, the court, in the case of *Stanly County vs. Snuggs*, held that those words in the code were retroactive and went back to

the time of the adoption of the constitution (April 24, 1868), although there was not a word or syllable in the said Code, or in the act of April 10, 1869, to indicate that they were intended to have any such retroactive effect. The learned counsel has argued in his briefs heretofore presented:

"It was deemed a part of the *policy* of the state to place its subdivisions under the same restrictions as the state, by preventing them from aiding in the completion of a road not then begun."

And this view is urged in his brief filed in this present case (pp. 33, 34).

The fact is that there was no "policy of the state" to prevent a *county* from aiding in the completion of a road not begun at the time of the adoption of the constitution, or at the time of the passage of the act of April 10, 1869, nor even to prevent the *state* from aiding such road. The only restriction was that a *county* should not aid any road begun, or not begun, unless by a vote of the people. The restriction on the part of the state was less than this, to wit, the state was permitted, *without* a vote of the people, to aid any railroad which had been begun, and was permitted to aid *any* railroad (begun or not begun) *with* a vote of the people.

The learned counsel for the county, would omit from his quotation of Article V., Section 4, of the constitution, the significant words "*a direct pecuniary*" [interest], which apply only to *state* railroad aid *without* a vote of the people, and then goes on seriously to argue that the same direct pecuniary interest is necessary in the case of aid by a county, although neither the code nor the constitution makes any such provi-

sion. The bare statement of such an argument is enough to refute it.

Mistake of counsel for the county in stating that the construction given Section 1996 of the Code by the United States Circuit Court of Appeals makes part of said section surplusage.

In the brief of the learned counsel for the county (p. 31) it is stated in substance that half of Section 1996 is declared surplusage by the United States Circuit Court of Appeals in order to lean against the construction given by the State Court. This is clearly an error. The part of Section 1996 which the learned counsel for the county seek to show is regarded as surplusage by the United States Circuit Court of Appeals is the last part, to wit : " when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest." If these words were rejected, the section would then read : " The Boards of Commissioners of the several counties shall have power to subscribe stock to any railroad company or companies." This would allow a county in the extreme western part of North Carolina to subscribe to stock of a railroad company in the extreme eastern part of North Carolina, hundreds of miles from the subscribing county. No one contends or has contended for any such construction of Section 1996 of the Code. The construction given to this Section 1996 of the Code by the United States Circuit Court of Appeals and the proper construction of the said section is that these words, " when necessary to aid in the completion of any railroad in which the citizens of the county may

have an interest," do have a meaning and they mean that stock can only be subscribed to aid in the completion of a railroad in which the citizens of the county **are interested as a public improvement for the use and good of the public.** The words in Section 1896 are fit and apt to express exactly this meaning and they do not require any other meaning to be given to them. This is the natural meaning, a meaning which gives to the section a practicable construction, and not one which gives it an impracticable construction such as is contended for by the learned counsel for the county. The learned counsel for the county must reject altogether the words "*the citizens*" and strike them out of this section in order to give to the section the meaning for which they contend. They must also insert before the word interest the word "pecuniary" in order to have any such construction given to this section of the Code as they contend for.

Thus, it is clear that it is not the construction which was given to this Section 1996 of the Code by the United States Circuit Court of Appeals, but the construction which the learned counsel for the county would place upon the section which does violence to the language of the section and strikes out part of the section and inserts words which are not found there.

The numerous decisions cited by the learned counsel for the county (pp. 26–28) to show what the words "interest" or "interested" mean when used in other statutes relating to other matters have absolutely no bearing whatever on the construction of the word interest in Section 1996 of the Code.

We notice that the learned counsel for the county find it necessary as a part of their argument (p. 33), to support their construction of Section 1996 of the Code

to advance the proposition that the citizens of the county, "*by reason of vicinage, had no other or greater interest*" in a railroad running near or through the county than any other citizens in the State. This proposition is so manifestly absurd and false that it carries with it its own condemnation. Do the learned counsel for the county mean to tell us that in the case of a county which like Wilkes County has no railroad the citizens of the county have no interest in having a railroad constructed through the county or have no other or greater interest than any other citizen of the State who lives hundreds of miles away from the county and away from the place where the railroad is to be constructed? We will not waste the time of the Court or our own time in answering any such obviously false and absurd proposition.

So, also, whether or not the railroad had been begun before April 10, 1869, or even before the adoption of the constitution (April 24, 1868), was a fact in pais to be determined by the county commissioners before they issued the bonds, and not a matter with which the holder of these negotiable municipal bonds is concerned.

The Code of North Carolina is one act (Code, Section 3876), and went into operation November 1st, 1883 (Code, Section 3866).

At the end of volume 2 of the Code, at bottom of page 603, *it is declared that the requirements of Sec.* 14, Article 2, of the Constitution of North Carolina, have been complied with in the passage of the Code; and this is also admitted.

The bondholders are not estopped by the recital, on the face of the bonds, that they were issued under the provisions of the Act of 1879, *provided it can be shown* that the commissioners of Wilkes County, in ordering the election and issuing the bonds, *acted also* under the provisions of Sections 1996 and 1997 of the Code.

It is apparent that they did. They gave notice of exactly thirty days, the time required by Section 1996 of the Code; the order speaks of the matter to be submitted as a "proposition," the word used in said section. *Besides, article 21 of the complaint declares that these bonds were, as a matter of fact,* issued under the provisions of these sections, as well as of the charter and the amendatory acts of 1868, 1879 and 1881. And article 21 of the answer does *not deny* this fact, but merely denies the *legal conclusions* arising from said admitted fact.

So it is admitted that the Board of Commissioners was proceeding under the provisions of sections 1996 and 1997 of the Code, as well as under the *acts set out in the record and under the charter.* If this be true, then the bonds are valid, notwithstanding the recitals in the bonds, provided the Code provisions conferred on the board the power to issue them.

Knox County vs. Ninth Nat. Bank, 147 U. S., 91.
Cairo vs. Zane, 149 U. S., 122.
Anderson, &c., vs. Beal, 113 U. S., 227.
Evansville vs. Dennett, 161 U. S., 434.
Wilkes County vs. Coler, 180 U. S., 506.

See further on this point *ante*, pp. 47–51, 89; see p. 122.

Negotiability of Municipal Bonds and What Negotiability Means.

We need not remind this Court that municipal bonds are negotiable with all that the word negotiable implies. Of course there must be power to issue the bonds, that is, a statute or other legislative enactment authorizing the issue of the bonds on some facts and under some circumstances. There is then, using the words often used by this Court "power to issue." Where this power to issue municipal bonds exists and bonds have been in fact issued in negotiable form, such bonds are negotiable paper with all that the word negotiable implies. The *bona fide* holder of such a bond is not affected by any equities in favor of the maker of the bond. It is no defense to such a negotiable instrument that certain facts *in pais* did or did not exist before the bond was issued or when the bond was issued.

If the rule were otherwise, then every purchaser of a negotiable municipal bond, as for example a purchase of the bonds of Stanly County, in the City of New York or in the City of London, would be bound to take a journey to Wilkes or Stanly County, North Carolina, and would be obliged at his peril and at all hazards to ascertain for himself whether or not the facts *in pais* which the county set up as a defense to its bonds did or did not exist, and this would be true not only of the first purchaser of the bond from the county, but of all subsequent purchasers however remote and for all the time that the bonds would be outstanding. Thus, for example, a purchaser of such a county bond ten, fifteen or twenty years after its issuance would be obliged at his peril to ascertain and enquire, as the learned counsel for the county now seeks to maintain, whether or

not at the time of the issuance of the bonds the citizens of the county had an interest in the railroad, whether or not the railroad had been in fact begun before a certain date, and other similar facts. How could any purchaser of a bond ten, fifteen, twenty or thirty years after its date ascertain any such facts?

No record required to be kept of such facts as are now set up by the county as a defense.

No statute required the county to keep any records of any fact as to whether or not the citizens of the county had an interest in the railroad or as to the date when the railroad was begun, or other similiar facts, and even if the statute had required any records to be kept, it would require a further provision in the statute that such records should be constructive notice to all persons of the facts therein required to be stated. In the absence of any such provisions, the purchaser, who under the theory now advanced by the county must at his peril and at all hazards ascertain regarding these facts, could not rely upon any records.

How could a purchaser of these negotiable Wilkes or Stanly County bonds who bought them in the City of New York or in the City of London be expected to make a journey to the County in North Carolina, to ascertain these facts before he purchases the bonds? Who would buy any municipal bonds under such circumstances and with such a burden resting upon him? But even if he were willing to take that burden and sought in good faith to ascertain the facts, what sort of an inquiry must he make? Must he go to the county and open a kind of court of inquiry and ascertain by bringing in all the old settlers in the place who are accessable and obtaining their recollections, such as they might be, as to what were the facts in the

matter? Even the conclusions arrived at by such a court of inquiry would not be conclusive but they would be always open to contest in any action on the bonds. It would be absolutely impossible, therefore, for an intending purchaser in the City of New York or in London ten, fifteen, twenty or thirty years after the issuance of the bonds by any such inquiry to determine conclusively whether or not the facts *in pais* existed before or at the time of the issuance of the bonds.

But all these mistaken views of the counsel for the county arise from ignoring the principle that the county officers constitute tribunal which is to determine once and for all time whether the facts *in pais* required by law to exist precedent to and in the issuance of the bonds do exist. A statute when it empowers county officers to issue bonds when certain facts and circumstances exist contemplates that these officers are a tribunal to determine whether or not the facts exist, and the issuance of the bonds by such officers is their determination made once and for all that such facts exist. Such officers are elected by the people of the county to represent the people of the county, and to them the Legislature confides the function and power of issuing negotiable bonds. Such officers, those elected and those legally entrusted with this power, constitute the tribunal, and the only tribunal to ascertain these facts *in pais*. If such facts cannot be ascertained by such a tribunal, then there is no way by which they can be ascertained.

If after negotiable bonds have been issued by a county or other municipality it is open at any time to the county, five, ten, twenty or thirty years afterwards, to set up as a defense to the bonds that a certain fact *in pais* did or did not exist, *then such bonds are not*

negotiable according to the law merchant, but would be reduced to the class of obligations known as mere choses in action, open at all times and in the hands of any *bona fide* holder to any defense whatsoever which could be set up in respect of any non-negotiable obligation. It would be nothing but a solemn mockery any longer to designate any such obligation as a *negotiable* bond.

But even if any statute should require any record whatever to be made concerning the facts, it would not follow that merely because records were to be kept that, therefore, the bonds are non-negotiable, and that every purchaser of the bonds must go and consult the records and satisfy himself at his peril in regard to the facts. Something more than that would be necessary; it would be necessary that the statute should expressly provide that such records should be constructive notice of the facts. Let this once be understood and let defenses like this prevail against municipal bonds and the market for municipal bonds is gone. We do not believe this Court will give its assent to any such doctrine.

What better tribunal could there possible be for the determination of all these matters *in pais* than the officers who issue the bonds. It is for the interest both of the municipality and of the investing public that these matters be determined somehow and determined conclusively before or at the time of the issuance of the bonds. The officers elected by the citizens of the county and having by law the charge of the affairs of the county, are really the agents of the county; they act on behalf of the county. It is for the interest of the county that it should be able to have some officers to represent it and to bind it by their acts; otherwise how is the county ever to act or

to carry on its public business? There is no more injustice to the county in holding that these officers of the county represent the county, and that their acts bind the county when they issue municipal bonds than when they do other acts on behalf of the county.

Suppose an intending purchaser of county bonds goes to the county and says, "I would like to buy your bonds, but I want to be sure before I buy them that all the facts and conditions exist on which you are authorized to issue the bonds, and I want this matter settled so that when I take and pay for the bonds I may know that the question cannot be reopened and so that any one to whom I sell the bonds will not be bound to make any examination of these facts." Why should not the county be permitted to say in reply, "These facts have been investigated by our officers, chosen as required by law, to represent us in the matter. Our officers have investigated these facts and are satisfied that they exist and the county is willing to be bound by their action, and the county will issue to you its negotiable bond, which is an unconditional and incontestible obligation, so that neither you nor any subsequent holder of this bond to whom you may desire to sell it shall be bound to investigate into all the facts preliminary to its issuance, but the absolute obligation of the county is determined once and for all."

Why should not the county be permitted to have its officers thus represent it in the ascertainment of all these facts? It is the only practicable thing to do. It is absolutely impossible for each bondholder and each subsequent purchaser of the bonds to make an investigation of the facts for himself. If the obligation of the county is ever going to be made uncon-

ditional and incontestible, why should it not be made so by the action of the county officers in the issuing of a bond negotiable in form and in fact cutting off all equities and defenses on the part of the county ?

These principles of the negotiability of municipal bonds and the results that flow from such negotiability have been most emphatically stated by the Supreme Court of North Carolina in the case of *Belo vs. Commissioners of Forsyth County* (76 N. C., 489 ; 1877), before the bonds in question were issued. In that case the Court said :

" Such bonds can be issued only in pursuance of a special grant of power, and the party claiming the benefit of such bonds must show a power in the corporate body to issue them, but if he is a purchaser for value without notice and before maturity, he need do no more. If a municipal corporation has the power to issue bonds only on a compliance with conditions precedent, as for instance, as here, in pursuance of a popular vote, and the bonds are issued, the presumption is that the conditions have been observed, and that they are *prima facie* valid, though the defendant may show the contrary unless he is estopped by his own acts from doing so. The principle, however, of equitable estoppel is a most important element in the transaction, for whether conditions precedent have been complied with is a matter of fact to be determined by some tribunal invested with the power and authority to decide it and the decision when made should be final. It is not disputed that the power to make a subscription of stock and to issue the bonds was conferred upon the County of Forsyth by the ordinance of the Convention. It is equally clear that the tribunal which was authorized to issue the bonds only on compliance with the conditions precedent was the sole tribunal to determine the fact whether the conditions had been fulfilled. In this case the Justices of the County, a majority concurring, was the court or tribunal designated to carry the law into effect and was the tribunal to decide whether the conditions had been complied with, and their decision is final in a suit by a *bona fide* holder of the bonds against the municipality. This determination of the question of fact by

the Justices is manifested in two ways: first, by the records of their court, and second, by the recitals in the bonds issued by them."

As Mr. Justice HARLAN states, in the recent case of *Gunnison County Commissioners vs. E. H. Rollins & Sons*, 173 U. S., 255:

"Indeed, it is entirely competent for a state to provide by statute that all obligations, in whatever form, executed by a municipality existing under its laws, shall be subject to any defense that would be allowed in case of non-negotiable instruments. But, for reasons that everyone understands, no such statutes have been passed. Municipal obligations executed under such a statute could not be readily disposed of to those who invest in such securities."

Conclusion.

We have thus made good, we submit, the proposition with which we set out in this brief, namely, *that there is double lawful legislative authority* for the issuance of these bonds, namely (A) the ordinance adopted by the Constitutional Convention of North Carolina, March 9, 1868, and (B) the separate and independent authority of Sections 1996 to 2000 of the Code of North Carolina. The bonds were issued in conformity both to said Ordinance and said sections of the Code.

This Court, therefore, should hold the said bonds valid, and affirm the judgment of the Circuit Court of Appeals.

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Of Counsel for Appellees.

APPENDIX.

Provisions of Constitution, Ordinance of Constitutional Convention and Statutes of North Carolina, which this Court may desire to refer to in connection with this case.

1.

The following are provisions of the **Constitution of North Carolina** (see Code of North Carolina, 1883, Volume 2):

"ARTICLE II.

"LEGISLATIVE DEPARTMENT.

* * * * * *

SECTION 12. "The General Assembly shall not pass any private law, unless it shall be made to appear thirty days' notice of application to pass such a law shall have been given under such direction, and in such manner as shall be provided by law."

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SECTION 14. "No law shall be passed to raise money on the credit of the State or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each House of the General Assembly and passed three several readings, which readings shall have been on three different days and agreed to by each House respectively, and unless the yeas and nays on the second and third reading of the bill shall have been entered on the Journal."

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SECTION 16. "Each House shall keep a journal of its proceedings, which shall be printed and made public

immediately after the adjournment of the General Assembly."

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SECTION 21. "The style of the acts shall be: 'The General Assembly of North Carolina do enact.'"

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SECTION 23. "All bills and resolutions of a legislative nature shall be read three times in each House before they pass into laws, and shall be signed by the presiding officers of both Houses."

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"ARTICLE IV.

"JUDICIAL DEPARTMENT.

SECTION 19. "The laws of North Carolina, not repugnant to this constitution, or the constitution and laws of the United States, shall be in force until lawfully altered."

ARTICLE V.

REVENUE AND TAXATION.

SECTION 1. "The General Assembly shall levy a capitation tax on every male inhabitant of the State over twenty-one and under fifty years of age, which shall be equal on each to the tax on property valued at three hundred dollars in cash. The Commissioners of the several counties may exempt from capitation tax in special cases, on account of poverty and infirmity, and the State and county capitation tax combined shall never exceed two dollars on the head."

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SECTION 4. "Until the bonds of the State shall be at par, the General Assembly shall have no power to contract any new debt or pecuniary obligation in behalf of the State, except to supply a casual deficit, or for suppressing invasion or insurrection, unless it shall in the same bill levy a special tax to pay the interest annually. And the General Assembly shall have no power to give or lend the credit of the State in aid of any person, association or corporation, except to aid in the completion of such railroads as may

be unfinished at the time of the adoption of this Constitution, or in which the State has a direct pecuniary interest, unless the subject be submitted to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon."

* * * * * *

SECTION 6. "The taxes levied by the Commissioners of the several counties for county purposes, shall be levied in like manner with the State taxes, and shall never exceed the double of the State tax, except for a special purpose, and with the special approval of the General Assembly."

SECTION 7. "Every act of the General Assembly levying a tax, shall state the special object to which it is to be applied, and it shall be applied to no other purpose."

ARTICLE VII.

* 2 * * * *

SECTION 7. "No county, city, town or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein."

SECTION 12. "All charters, ordinances and provisions relating to municipal corporations shall remain in force until legally changed, unless inconsistent with the provisions of this constitution."

2.

Ordinance of Constitutional Convention, passed March 9, 1868 (**authorizing bonds in question**), printed in full in Record, page 10.

3.

Chapter 136, Laws of North Carolina, Session of 1852, Sections 33 to 37, inclusive, (being the act referred to in Section 12 of the said

ordinance of March 9, 1868), printed in full in Record, page 54.

4.

Act of August 11, 1868, printed in full in Record, page 13.

5.

Act of February 20, 1879, printed in full in Record, page 14.

6.

Act of March 2, 1881, printed in full in Record, page 17.

7.

Act of April 10, 1869, being Chapter CLXII of the Laws of 1868, 1869, (p. 417), an Act to authorize the several counties of the State to take stock in railroad companies.

SECTION 1. The General Assembly of North Carolina do enact, that the County Commissioners of the several Counties in this State shall have power to subscribe stock to any Rail Road Company or Companies, when nessary to aid in the completion of any Rail Road in which the citizens of the County may have an interest.

SEC. 2. That the Commissioners of any County proposing to take stock in any Rail Road Company shall meet and agree upon the amount to be subscribed, and if a majority of the Commissioners shall vote for the proposition, this shall be entered of record, which shall show the amount proposed to be subscribed, to what company, and whether in bonds, money or other property, and thereupon the Commissioners shall order an election, to be held on a notice of not less than thirty days for the purpose of voting for or against the

proposition to subscribe the amount of stock agreed on by the County Commissioners. And if a majority of the qualified voters of the County shall vote in favor of the proposition, the County Commissioners, through their Chairman, shall have power to subscribe the amount of stock proposed by them, and submitted to the people subject to all the rules, regulations and restrictions of other stockholders in such company or companies : Provided, also, That the Counties, in the manner aforesaid, shall subscribe from time to time such amounts, either in bonds or money, as they may think proper.

SEC. 3. That all elections ordered under the second section of this act shall be held by the Sheriff under the laws and regulations provided for the election of members of the General Assembly. The votes shall be compared by the County Commissioners, who shall make a record of the same.

SEC. 4. In case the County shall subscribe the amount proposed in bonds, the Commissioners shall have power to fix the rate of interest, not to exceed the rate of eight per cent., when the interest on said bonds shall be payable, and at what place, and shall also fix the time and places of paying the interest, and shall also determine the mod and manner of the same ; and also to raise by taxation, from year to year, the amount necessary to meet the interest on said bonds.

SEC. 5. The taxes authorized by this act, to be raised for the payment of interest or principal, shall be collected by the Sheriff in like manner as other public taxes, shall be paid into the hands of the County Treasurer, to be used by the Chairman of the County Commissioners as directed by this act.

SEC. 6. This act shall be in force from and after its ratification.

Ratified the 10th day of April, A. D. 1869.

[The Act of April 10, 1869, was afterwards incorporated in the Code of 1883 and designated as Sections 1996–2000, next below reprinted]

8.

THE CODE SECTIONS.

Sections 1996-2000 of the Code of North Carolina of 1883 (**also authorizing bonds in question**):

"SEC. 1996. The boards of commissioners of the several counties shall have power to subscribe stock to any railroad company or companies when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest.

SEC. 1997. The board of commissioners of any county proposing to take stock in any railroad company shall meet and agree upon the amount to be subscribed, and, if a majority of the board shall vote for the proposition, this shall be entered upon the record, which shall show the amount proposed to be subscribed, to what company, and whether in bonds, money or other property, and thereupon the board shall order an election, to be held on a notice of not less than thirty days, for the purpose of voting for or against the proposition to subscribe the amount of stock agreed on by the board of county commissioners. And, if a majority of the qualified voters of the county shall vote in favor of the proposition, the board of county commissioners, through their chairman, shall have power to subscribe the ammount of stock proposed by them and submitted ts the people, subject to all the rules, regulations and restrictions of other stockholders in such company or companies. Provided, that the counties, in the manner aforesaid, shall subscribe from time to time such amounts, either in bonds or money, as they may think proper.

SEC. 1898. All elections ordered under the preceding section shall be held by the sheriff under the laws and regulations provided for the election of members of the General Assembly. The votes shall be compared by *the board of county commissioners*, who shall make a record of the same.

SEC. 1999. In case the *county* shall subscribe the amount proposed in bonds, *the board of commissioners shall have power* to fix the rate of interest, not to ex-

ceed the rate of eight per cent., when the interest on said bonds shall be payable, and at what place, and shall also fix the time and places of paying the interest, and shall also determine the mode and manner of the same; and also to raise by taxation, from year to year, the amount necessary to meet the interest on said bonds.

SEC. 2000. The taxes authorized by the three preceding sections to be raised for the payment of interest or principal shall be collected by the *sheriff in like manner as other State taxes*, and be paid into the hands of the county treasurer to be used by the chairman of the board of county commissioners as directed by this chapter."

It is admitted by all parties and all courts that these sections of the Code are constitutionally valid, and authorize the issue of bonds on the conditions therein prescribed.

Code sections 1996 to 2000 were originally the above-printed act of April 10, 1869, the title of which is, "An act to authorize the several counties of the State to take stock in railroad companies." Chapter 171, Public Laws, North Carolina, 1868–69. Ratified April 10, 1869. Public Laws, North Carolina, 1868–69, page 417. Re-enacted in Battle's Revisal, January 1, 1874; re-enacted in Code of North Carolina which went into effect November 1, 1883.

We here print at length the said two cases just cited, fully and exactly as they appear in the official reports of the decisions of the Supreme Court of the State of North Carolina.

The report of the *Hill* case is as follows :

"John G. Hill et al. vs. The Commissioners of Forsythe County.*

[67 N. C., 367, June Term, 1870.]

An act of the General Assembly authorizing the People of a County to take stock in a Railroad Company, and to determine the question by a popular vote, and tax themselves to pay for it, is constitutional.

[*Taylor vs. Commissioners of Newbern*, 2 Jones Eq., 141; *Caldwell vs. Justices of Burke*, 4 Jones Eq., 323, cited and approved.]

Motion to vacate an injunction heard before CLOUD, J., at.....Term of Forsythe Superior Court.

This was an application on the part of the plaintiffs, who represented themselves as taxpayers and property holders of the county of Forsythe, in behalf of themselves and others, asking for an injunction against

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* "NOTE.—The case of *Simonton vs. The Commissioners of Burke*, involving the same question, was decided at this term, and for the same reasons judgment was given for the plaintiff."

the defendants, to restrain them from the imposition and collection of certain taxes, to pay instalments due upon a subscription made by the county of Forsythe to the North Western North Carolina Railroad Company. The following facts were found by the presiding Judge: 'A majority of the justices of the peace were present at the court house in Winston on the 25th day of March, 1868, and made an order to submit the question of subscription to the qualified voters of the county on the 4th day of April, 1868, and directed the sheriff to open the polls on that day.

That notice of this election was published in two newspapers, printed and circulated in that county; that said election was held at the time appointed, and at the usual places for holding elections in said county, and due return of the result of the voting was made to June Term of the County Court; that a majority of the jutices of the county were present, and on the bench at the said June Term, concurring in the orders made; that a large majority of the qualified voters of the county did vote on the question of subscription, and that a majority of the said votes were cast in favor of subscription; that a subscription of 1,000 shares of stock was made by the agent of the county appointed for that purpose on the_____day of June, 1868; that the defendants have laid taxes to pay the instalments due upon the subscription made to the North Western North Carolina Railroad Company for the years 1870-71.

Upon the foregoing state of facts the injunction, theretofore granted, was vacated by his Honor. Whereupon the plaintiffs appealed to the Supreme Court.

Several errors were assigned. The chief one and the only one discussed by the Court is: 'That the injunction was dissolved and defendants allowed to collect the taxes without any constitutional power in the legislature to authorize the subscription, and without a sufficient compliance with the acts of the General Assembly in that case made and provided.'

Scales & Scales and *Dillard & Gilmer*, for plaintiffs.

Clement, Masten and Batchelor, for defendants.

READE, J.: The main question is whether the legislature has the power to authorize the people of a county to take stock in a railroad, and to determine the question by a popular vote, and to tax themselves to pay for it. The Legislature in 1852 authorized the town of Newbern to take stock in the Neuse River

Navigation Company, for the use of the town, and to issue bonds and to levy a tax upon the property holders of the town to pay them. One of the taxpayers filed a bill to enjoin the collection of the tax, upon the ground that the act of the Legislature was unconstitutional. The question was fully argued and well considered, and the decision was in favor of the constitutionality of the act (*Taylor vs. Comrs. of Newbern*, 2 Jones Eq., 141).

And, again, in 1855, the Legislature chartered the Western North Carolina Railroad Company and authorized any county through which the road might pass to take stock if a majority of the justices of the peace and a majority of the voters should so determine, and to issue bonds and to levy a tax, &c. The county of Burke took stock, and one of the taxpayers filed a bill to enjoin, upon the ground that the act was unconstitutional. But this court decided in favor of the constitutionality of the act, and, in the opinion, it is said: 'In accordance with these views is the case of *Taylor vs. Newbern (supra)*, so that the question may be said to be settled here' (*Caldwell vs. Justices of Burke*, 4 Jones Eq., 323). The defendants' counsel cited, also, decisions in most of our sister States to the same effect. So that we repeat what was said in *Caldwell vs. Justices of Burke*, that the question is settled. We suppose that the plaintiffs' counsel felt at liberty to treat it as an open question, because in *Caldwell vs. Justices of Burke* there was a dissenting opinion by the present Chief-Justice; but the Court was unanimous upon this point. The dissenting opinion was only as to the power of a second vote of the people after they had rejected the proposition by a former vote.

There are divers other points in the complaint which seem to be unfounded, and besides they are unimportant. The main thing—the people's will—seems to have been fairly obtained. The stock was taken; bonds were issued; rights have vested; taxes have been levied and a portion of the installments have been paid, and taxes are now laid to pay other installments. The Board of Commissioners, who may be supposed to represent the popular will, are anxious to meet the obligations incurred, and the Court will not allow technical and frivolous objections, calculated to impair the public faith, to avail a *few*, who are indulged with

the privilege of suing for a *class*. Only their substantial rights will be considered.

We agree with his Honor that the injunction ought to have been dissolved.

There is no error. This will be certified, &c.

Simonton vs. Commissioners of Burke at this Term.

Per Curiam. Judgment affirmed."

NOTE that the subscription was made at the *June* Term, 1868, at which time the Ordinance was the only source of the authority to subscribe the stock and issue the bonds which were sustained in the *Hill* case just quoted, as well as in the *Belo* case next given, and where the facts relating to the subscription and bonds are more fully stated in the opinion of BYNUM, J.

The report of the *Belo case* is *verbatim* as follows:

"Edward Belo vs. The Commissioners of Forsythe County.

"[76 N. C., 489, January Term, 1877.]

"MUNICIPAL BONDS—CONDITIONS PRECEDENT—ACTION BY PURCHASER FOR VALUE—INJUNCTION BY TAX-PAYER—RETROSPECTIVE STATUTE—JUDGE'S CHARGE—EVIDENCE.

"1. Municipal bonds unpaid at maturity are dishonored like other commercial paper, and a purchaser after maturity holds them subject to all defects which would invalidate them in the hands of the original holder.

"2. In an action against a municipal corporation upon a bond issued by it, by a purchaser for value without notice, the plaintiff need only show a *power* in the corporate body to issue the bond.

"3. If a municipal corporation has the power to issue bonds upon certain conditions precedent, and such bonds are issued, the presumption is that the conditions were complied with and the bonds are *prima facie* valid. The corporation, however, can show the contrary, unless it is *estopped* by its own acts from so doing.

"4. When authority to issue municipal bonds upon the performance of certain conditions precedent is con-

ferred by statute upon a particular tribunal, such tribunal has the sole power to determine the fact whether the conditions have been performed or not."

"5. In an action by a *bona fide* purchaser for value against a County upon a bond issued by the former County Court of such County under an Act of the Legislature, the records of such Court are conclusive upon the County. The recitals in the bond are also conclusive upon the County and constitute an estoppel *in pais*.

"6. A taxpayer, for sufficient cause, can intervene in apt time and enjoin the issuing of municipal bonds, but this must be done before the bonds are issued and negotiated and pass into circulation as commercial securities.

"7. It is competent for the Legislature, by a retrospective statute, to validate an irregular or defective execution of a power by the authorities of a municipal corporation acting under a former statute where no contract is impaired, and the rights of third persons are not injuriously affected.

"8. Where the plaintiff testified on the trial below and introduced evidence of good character, and the defendant asked His Honor to charge the jury that they were not bound to believe the plaintiff in passing upon the issue, which His Honor refused, and charged the jury that 'they were not bound to believe anybody,' and added 'that, when men who have proved a good character before the jury testify, the presumption is that they will not lie,' &c. *Held*, not to be error.

> "*Chester & Lenoir R. R. Co. vs. Comrs. of Caldwell*, 72 N. C., 486, cited and approved.

"This was an Action for a Mandamus to compel the defendants to provide for the payment of certain bonds alleged to have been issued pursuant to law by the County of Forsythe, tried at Spring Term, 1876, of Davidson Superior Court, before CLOUD, *J.*

"The action was commenced in Forsythe and removed to Davidson.

"The question presented for the decision of this Court is so elaborately discussed by Mr. Justice BYNUM, in delivering the opinion, that a statement of the facts is deemed unnecessary.

"Upon the issues submitted, and under the instructions of His Honor in the Court below, the jury rendered a verdict for the plaintiff. Judgment. Appeal by the defendants.

"*Mr. J. M. McCorkle* for plaintiff.

"*Messrs. Dillard & Gilmer, Shipp & Bailey and Watson & Glenn* for defendants.

BYNUM, J.: The North Western North Carolina Railroad Company was incorporated by an ordinance of the Convention of 1868, and, by Section 12 of the charter, the same power to subscribe to the capital stock of the company and subject to the like regulations and restrictions is given to Counties and Towns as was conferred by an Act incorporating the Atlantic & N. C. Railroad Company, passed by the Legislature of 1852. By section 34 of the latter Act the Justices of the County through or near which the road was located, "a majority concurring," are authorized to fix upon a subscription sum and submit it to the voters of the County. If the majority favored subscription, the Justices were to choose an agent to subscribe the stock voted and to prepare and issue County bonds, as the Justices should direct. The minutes of the Special Term of the County Court of Forsythe County, which ordered the proposition to be submitted to the popular vote, recite that a majority of the Justices were present, concurring in the order. The vote resulted in favor of subscription, and was so certified to the succeeding Court, held in June, 1868.

The minutes of that Term recite that 35 Justices were present, which number is admitted to be a majority of the whole number. At this latter Term of the Court, the Justices ordered the subscription to be made to the capital stock of the Company, and the bonds to be prepared and issued and sold by the agent then chosen. The bonds were accordingly put upon the market, and among them the identical bonds now sued on were by the agent sold to one Lemly, at his Banking House in Salem, on 5th of March, 1869. These bonds recite that they were 'authorized by an ordinance of 1868, by an order of the Court of Pleas and Quarter Sessions of Forsythe County at June Term, 1868, and re-enacted and ratified and confirmed by an Act of the General Assembly, ratified the 11th of August, 1868'.

At the same Term at which the subscription was made, the Justices assessed a special tax upon the

County to meet the semi-annual interest on the bonds. This Special Railroad Tax was annually assessed, levied and collected and applied in the discharge of the accruing interest upon the bonds from that time until 1872. A certificate for the stock subscribed was issued by the Railroad Company to the County, which it yet holds; an agent was annually chosen to represent and did represent the County stock in all the meetings of the Company. Under the new State Constitution of 1868, a Board of County Commissioners succeeded to all the powers and duties of the Justices, and up to 1872 this Board unanimously caused the levy and collection of the Railroad Tax and its application to the discharge of the coupons due upon the bonds. But the Board elected in 1872 refused to assess any further tax and to pay any further interest upon the bonds, alleging as the reason therefor that the subscription of stock so made by the County was illegal and void.

I. The plaintiff purchased the bonds in suit of Lemly in May, 1873, *after* they fell due. The bonds were then dishonored, like other commercial paper remaining unpaid at maturity, and the plaintiff is a purchaser with notice of all defects which would invalidate them in the hands of Lemly. He acquired no better title than his transferror. Any defense which could be asserted against the claim of Lemly can be maintained by the County against the plaintiff (1 Daniel on Negotiable Instruments, Sec. 782; *Arrents vs. Commonwealth*, 18 Grat., 773; 14 Minn., 79). The question then is: were the bonds invalid in the hands of Lemly, who purchased them from the County before maturity? The defense to the action is that the election could be ordered and the subscription of stock made only by the concurrence of a majority of the Justices of the County, and that in point of fact no such majority did concur, and, therefore, the subscription and the bonds issued therefor are void, even in the hands of a *bona fide* holder of the bonds before they fell due. This proposition cannot be maintained. Municipal bonds are negotiable instruments, and the legal rights of the holders of such paper do not so much rest upon abstract propositions, though true, as upon a system of practical rules found by experience to be essential to healthy commercial life. For the public protection and the convenience of trade, every intendment is made in favor of the validity of negotiable instru-

ments. Where bonds have been issued and sold in the market, and have come into the hands of a *bona fide* holder before maturity, as a general rule such bonds are *prima facie* valid, and the *onus* is upon the party impeaching them to show the contrary. This rule, however, which subsists between individuals, is much modified in respect to corporate bonds. Such bonds can be issued only in pursuance of a special grant of power, and the party claiming the benefit of such bonds must show a *power* in the corporate body to issue them. But if he is a purchaser for value without notice and before maturity, he need do no more. If a municipal corporation has the power to issue bonds only on a compliance with conditions precedent, as, for instance, as here, in pursuance of a popular vote and the bonds are issued, the presumption is that the conditions have been observed and they are *prima facie* valid, though the defendant may show the contrary unless he is *estopped* by his own acts from doing so. The principle, however, of equitable estoppel is a most important element in the transaction. For whether conditions precedent have been complied with is a matter of fact to be determined by some tribunal invested with the power and authority to decide it, and the decision when made should be final. It is not disputed that the *power* to make the subscription of stock and issue the bonds was conferred upon the County of Forsythe by the Ordinance of the Convention. It is equally clear that the tribunal which was authorized to issue the bonds only on compliance with conditions precedent was the sole tribunal to determine the fact whether the conditions had been fulfilled. In our case the Justices of the County, a majority concurring, was the Court or tribunal designated to carry the law into effect, and was the tribunal to decide whether the conditions had been complied with, and their decision is final in a suit by a *bona fide* holder of the bonds against the municipality. This determination of a question of fact by the Justices is manifested in two ways: first, by the records of their Co rt, and, second, by the recitals in the bonds issued by them. The Justices were authorized by the Act to take the sense of the people, declare the result and issue the bonds. Their declaration spread upon the Minutes of the Court and made a record is conclusive against the County in favor of all *bona fide* bondholders without notice. If they purchased, before maturity, they

need look no further (*Marcy vs. Township of Oswego*, 92 U. S. Rep., 637; *Dunning vs. Houston*, 18 Am. Rep., 253, and note). If there was fraud in making the record, or irregularities in the election which would vitiate the bonds upon exceptions taken in apt time, any taxpayer of the County could intervene and enjoin their issue. But this could only have been done before the bonds were issued, negotiated and passed into circulation as commercial securities, with the insignia of validity impressed upon their face (*Chester & Lenoir R. R. Co. vs. Caldwell Co.*, 72 N. C., 486). If intentionally or by neglect the taxpayers fail to protest, interfere or assert their legal rights; if they suffer the election to be held, a false result declared, the bonds to be issued and sold, and the proceeds received by their agents; if for the period of four years they annually submit to a special tax, which is applied in payment of the accruing interest on the bonds; if they still retain the Railroad stock without an offer to surrender it and continue to have it represented in the meetings of the Company, they cannot now disaffirm the acts of their public agents who issued and negotiated the sale of the bonds. They had the opportunity to intervene and protect themselves before the rights of third persons accrued. Their acquiescence is a ratification by the principal of the acts of his agent, and, according to all the leading authorities upon this question, the doctrine of equitable estoppel is a complete bar, and is strictly applied to the enforcement of these municipal obligations (2 Daniel on Neg. Instr., Sec. 479; *State vs. Vanhorne*, 7 Ohio St., 331; *Barrett vs. County Court*, 44 Mo., 201).

While the decisions are very uniform that the record of the Justices Court affirming the fact of compliance with the conditions precedent to the subscription of stock is conclusive and estops the County from denying the validity of the bonds in the hands of a *bona fide* holder before maturity, they are equally uniform in giving the same effect to the *recitals* in the bonds themselves that they had been issued in pursuance of the law which authorized their issue. The recital is a determination of the question, and the holder has the right to rely on it (*Town of Coloma vs. Evans*, 92 U. S. Rep., 484; *Lynch vs. Winnebago*, 16 Wall., 13; *Knox County vs. Aspinwall*, 21 How., 539). In delivering the opinion of the Court in *Coloma vs. Evans*, Mr. Justice STRONG says: "In the

leading case of *Knox County vs. Aspinwall*, the decision was rested upon two grounds. One of them was that the mere issue of the bonds containing a recital that they were issued in pursuance of the Legislative Act was a sufficient basis for the assumption by the purchaser that the conditions on which the County was authorized to issue them had been complied with, and it was said the purchaser was not bound to look further for evidence of such compliance, though the recital did not affirm it. This position was supported by reference to the *Royal British Bank vs. Turquand*, 6 Ellis and Blackburn, 327, a case in the Exchequer Chamber, which fully sustains it and the decision in which was concurred in by all the Judges. This position has been more than once re-affirmed in this Court. It was in *Moran vs. Miami County*, 2 Black., 732; in *Mercer County vs. Hacket*, 1 Wall., 83; in *Supervisors vs. Schenck*, 5 Wall., 784, and in *Meyer vs. Muscatine*, 1 Wall., 384. It has never been overruled, and whatever doubts may have been suggested respecting its correctness to the full extent to which it has been sometimes announced, there should be no doubt of the entire correctness of the other rule asserted in *Knox vs. Aspinwall*. That has been so firmly seated in reason and authority that it cannot be shaken." To the same effect is the recent case of *Humbolt Township vs. Long*, 92 U. S. Rep., 642. See, also, a valuable summary of the doctrine as established by the decisions of the Supreme Court of the United States by Judge DILLON, 'Law of Municipal Bonds,' Sec. 11, the result of which is that the recitals in the bonds to that effect are conclusive of compliance with the conditions precedent, and constitute an estoppel *in pais* upon the municipalities.

Up to this point the discussion has been upon the idea that the bonds were, in fact, irregularly issued, and were good only in the hands of a *bona fide* purchaser before maturity and without notice. It may well be doubted whether this is not conceding too much. Suppose the plaintiff had been the original purchaser from the County after the bonds matured and, therefore, fixed with notice, and suppose, further, that the County, in defense, could go behind the action of the Justices and the recitals in the bonds, it by no means follows that their invalidity could then be established, for the County was clothed with the power to issue them, and it is admitted that a

majority vote sanctioned the subscription of stock and the issue of the bonds. The real condition precedent was the consent of the tax payers, and that had been thus regularly obtained. The provisions of the Act as to the mode of submitting the question were subordinate and conducive to the main purpose, and may, therefore, be properly considered as directory only and not of the essence. When the subscription was voted there is authority and reason for asserting that the Justices could have been compelled by process of law to make the subscription, unless in defense they could have shown that the election was not fairly conducted, but was influenced by the fraud of the Railroad Company (People vs. Supervisors, 27 Cal., 655). As the case is presented to us, that question does not arise, and we do not decide it.

So far, as to the rights of the parties under the original Act of the Railroad Corporation, granted by the Convention of 1868.

II. But the plaintiff further relies upon a subsequent Act of the Legislature, ratified the 11th of August, 1868, which confirms the original charter of March, 1868. This Act, in express terms 'ratifies all Acts and things heretofore done under the provisions of said ordinance,' and confers upon the 'Board of Commissioners of the County full power and authority to levy from time to time such tax as may be sufficient to pay the subscription made by said County to the capital stock of the North Western North Carolina Railroad Company and any interest due thereon, or to liquidate any debt created by the County in borrowing money to pay such stock subscription.'

The competency of the Legislature to enact retrospective statutes to validate an irregular or defective execution of power by a County corporation is well settled. In *St. Joseph Township vs. Rogers*, 16 Wall., 644, the election at which the subscription was approved was held before the law authorizing the subscription, and the Court there decide that this and all defective subscriptions of the kind may be ratified where the Legislature could have originally conferred the power, and that such laws, when they do not impair any contract or injuriously affect the rights of third persons are never objectionable (Dillon's Law of Municipal Bonds, Sec. 21; *Butler vs. Dubois*, 29 Ill., 105; 49 Mo., 225). The ratification operates as a previous author-

ity (2 Daniel on Neg. Instr., 492; Cooley on Const. Lim., Secs. 370-381; *Knap vs. Grant*, 27 Wis., 147).

Declaring, as we do, that the ratifying Act of August, 1868, was a curative Act, and validated both the County subscription and the issue of the bonds, if any defects existed therein—and it has been one purpose of this opinion to show that the bonds were valid in the hands of *bona fide* holders without the aid of this healing Act—the proposed evidence of the defendant became immaterial and irrelevant. As a matter of law, the bonds were valid and the Court did not err in so declaring.

The only issue submitted to the jury was: 'Is the plaintiff the *bona fide* owner and for value of the bonds and coupons mentioned in the pleadings, and was he such at the commencement of the action?' Upon the trial of this issue the plaintiff was introduced and testified as a witness. The defendant requested the Court to charge the jury that they were not bound to believe the plaintiff in passing upon the issue. The Court refused so to charge, but told the jury 'they were not bound to believe anybody, and added that, when men who have proved a good character before the jury testify, the presumption is that they will not lie, and that there was evidence before the jury that the plaintiff was a man of good character, and no witness had been introduced to assail his character.' There was no error in that. Without this reinforcement of a proved good character, men are presumed to tell the truth. The whole theory of jury trials, and, indeed, of all human intercourse, is based upon that presumption.

His Honor expressed himself with needless emphasis, but we do not see that the jury were misled thereby.

It is estimated that the municipal indebtedness of this country has already reached the enormous sum of $900,000,000, and is rapidly increasing, nearly the whole of which is evidenced by negotiable securities issued for almost every conceivable purpose by cities, counties and townships. These bonds represent a large portion of the wealth of the country, and, whether held for investment or active employment, they enter into the complex business of commercial life. This municipal power to issue bonds, which is the growth of the last thirty years, has already overwhelmed the country with an indebtedness which threatens political society and social order to their foundations. No check against our indebtedness is so effectual as that

you must pay as you go, but this is utterly disregarded in the legislation which authorizes the issue of bonds payable at a remote future period. As soon as the sting of taxation is felt, the self-burdened people cast about for relief, and, after some hesitating scruples, plunge into repudiation or other methods involving the sacrifice of public faith, with its dismal train of evils. No refuge for repudiation can be found in the legal tribunals of the country. They have sternly resisted every subterfuge to escape the just obligation of these contracts. No branch of the law has been more thoroughly investigated and discussed with the view of setting it upon a just and pure foundation. And it is the glory of the law that, while by the application of legal principles it enforces the discharge of such obligations, it at the same time preserves the public morals in maintaining the integrity of solemn contracts inviolable. In no other practical way perhaps will the taxpayers be sooner brought to a more vigilant watchfulness over their own affairs, and a more careful selection of their public agents (See Dillon on Municipal Bonds, Sec. 1).

There is no error.

Per Curiam. Judgment affirmed."

Supreme Court of the United States.

No. 247.—October Term, 1902.

The Board of Commissioners of Wilkes County and John H. Johnson, Sheriff and ex officio Treasurer of Wilkes County,
vs.
W. N. Coler & Company.

On writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[May 18th 1903.]

Mr. Justice Harlan delivered the opinion of the Court.

This is an action against Wilkes County, North Carolina, upon certain bonds, each reciting that it was issued in payment of the subscription by that county to the capital stock of the Northwestern North Carolina Railroad Company, "by authority of an act of the General Assembly of North Carolina, ratified the 20th day of February A. D. 1879, entitled 'An act to amend the charter of the Northwestern North Carolina Railroad for the construction of a second division from the towns of Winston and Salem, in Forsyth County, up the Yadkin Vally, by Wilkesboro, to Patterson's factory, Caldwell County,' and authorized by a vote of a majority of the qualified voters of Wilkes County, by an election regularly held for that purpose on the 6th day of November A. D. 1888, and by an order of the Board of Commissioners of Wilkes County made on the first day of April A. D. 1889."

Coler & Co., holders of some of the bonds, obtained a judgment against the county in the Circuit Court. The case was then carried to the Circuit Court of Appeals, which certified certain questions to this court under the Judiciary Act of March 3d 1891, c. 517. Those questions were answered, and the answers having been certified to the court below, the case was finally tried, resulting in the affirmance of the judgment against the county. *Wilkes County* v. *Coler*, 180 *U. S.* 506; *Board of Commissioners* v. *Coler*, 113 *Fed. Rep.* 725. It is now here on writ of certiorari sued out by Wilkes County.

The facts out of which this litigation arose are fully set forth in the former opinion. It is necessary to restate some of them as well as to recall the points heretofore decided.

It appears that the principal question in the case, when formerly here, was as to the effect of the recitals in the bonds.

The plaintiffs contended that being *bona fide* holders they were entitled to assume that there had been a compliance with all the provisions of the

act of February 20th 1879, upon the authority of which the bonds purported to have been issued.

The defendant contended that as the journals of the respective houses of the Legislature did not show that the yeas and nays were entered on the second and third readings of the bill subsequently published as the act of February 20th 1879, that act was void under section 14 of Article 2 of the State constitution, providing that "No law shall be passed . . to impose any tax upon the people of the State, or to allow the counties, cities or towns to do so, unless the bill for that purpose shall have been read three several times in each house of the General Assembly, and passed three several readings, which readings shall have been on three different days, and agreed to by each house respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the journal."

This contention of the county was supported by several decisions of the Supreme Court of North Carolina that are referred to in our former opinion; and one of the questions propounded to this court was whether the Circuit Court should accept those decisions as controlling in respect of the alleged invalidity of the act of 1879. That question was answered in the affirmative, this court being of opinion that as matter of propriety and right the decision of the State court on the question as to what is a *law* of the State was binding upon the courts of the United States. 180 *U. S.* 506, 526.

That answer, of course, eliminated from the case the act of 1879 as giving authority to issue the bonds in suit; and it, therefore, became necessary to inquire whether such authority could be found elsewhere in the legislation of the State—this court being of opinion that the invalidity of the act of 1879, as conferring power to issue the bonds, did not estop holders of bonds from showing that there was in fact ample authority to issue them.

It was insisted that sufficient authority was to be found in the Ordinance of March 8th 1868, passed by the Convention that assembled at Raleigh, North Carolina, on January 14th 1868, for the purpose of framing a constitution for that State.

By that Ordinance, which took effect from its passage, it was provided: "That for the purpose of constructing a railroad of one or more tracks, from some point on the North Carolina Railroad, between the town of Greensboro, in Guilford County, and the town of Lexington, in Davidson County, running by way of Salem and Winston, in Forsyth County, to some point in the northwestern boundary line of the State, to be hereafter determined, a company is hereby incorporated under the name and style of the Northwestern North Carolina Railroad Company, with a capital stock of two millions of dollars, which shall have a corporate existence as a body politic, for the space of ninety-nine years, . . § 1. . . That

the capital stock of said company may be created by subscriptions on the part of individuals, corporations and counties, in shares of one hundred dollars. §2. . . That after the organization of said company and the election of the president and other necessary officers, the officers so elected shall proceed, under the advice of the directors, to locate the eastern terminus of the Northwestern North Carolina Railroad, and shall proceed to construct said road, with one or more tracks, as speedily as practicable, in sections of five miles each, to the towns of Winston and Salem in Forsyth County, which portion of said railroad, when completed, shall constitute its first division: *Provided*, That if the distance from the nearest section to the towns of Winston and Salem be less than five miles, the same shall be considered a section. §5. . . That the stockholders of said company may pay the stock subscribed by them either in money, labor or material for constructing said road, as the board of directors may determine, and that all counties or towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company, [Atlantic and North Carolina Railroad Company,] for the government of such towns and counties as are now allowed to subscribe to the capital stock of said company. §12. . . That the company shall have power to construct branches of said road, one of which shall run from the towns of Winston and Salem by way of Mount Airy, in Surry County, to the line of the State of Virginia." §13.

The act incorporating the Atlantic and North Carolina Railroad Company, referred to in the Ordinance of 1868, was passed in 1852. *Laws of N. C.* 1852, *pp.* 484, 499. By section 33 of that act it was made "lawful for any incorporated town or county near or through which said railroad may pass to subscribe for such an amount of stock in said company as they shall be authorized to do by the inhabitants of said town or the citizens of said county, in manner and form as hereinafter provided." By section 35 it was provided "that if upon the return of such constable . . it shall appear that a majority of the qualified voters of such town and by the return of the sheriff that a majority of the qualified voters of such county voting upon the question are in favor of the subscription, the corporate authorities of such town, and the justices of such county shall appoint an agent to make the subscription in behalf of such town and county, to be paid for in the bonds of such town and county and on such time as shall be agreed on by said town officers and the justices of such county." *Laws N. C.* 1852, *c.* 136.

After referring to certain decisions of the Supreme Court of North Carolina, relating to the Ordinance of 1868—particularly *Hill* v. *Com'rs*, 67 *N. C.* 367, and *Belo* v. *Com'rs*, 76 *N. C.* 489—we said: "It results that when the bonds here in question were issued in 1889, it was the law of North Caro-

lina that the Ordinance of 1868, constituting the charter of the North Western North Carolina Railroad Company, was not superseded by the constitution of 1868, but was in force and therefore gave power to counties *embraced by its provisions* to take stock in that company and pay for it in county bonds just as Forsyth County had done." 180 *U. S.* 529.

Another principle announced in our former opinion was that the rights of the parties were to be determined by the law of the State as it was declared by the State court to be at the time the bonds were issued in the name of the county and put upon the market.

As indicating some of the points left undecided, we make this extract from our opinion:

"We have referred fully to the *Hill* and *Belo* cases because of the earnest contention of learned counsel that under the law of North Carolina, as declared in those cases before the bonds in question were made, the Ordinance of 1868, without the aid of subsequent legislation, gave full power to Wilkes County to issue such bonds. This view suggests various questions as to the scope and effect of that Ordinance. Assuming, as we must, that the *Belo* and *Hill* cases held that the Ordinance of 1868 remained in force after the adoption of the constitution, did the general power given by that Ordinance to the Northwestern Railroad Company to construct a railroad from its eastern terminus, 'running by way of Salem and Winston, in Forsyth County, to *some* point in the northwestern boundary line of the State, *to be hereafter determined*,' invest Wilkes County with authority to subscribe to the stock of the company and to issue bonds in payment of such subscription? Was Wilkes County in the same category with Forsyth County? Was the route of the road northwest of Salem and Winston to some point in the northwestern boundary line of the State to be determined by the legislature or by the company? If by the legislature, was that route ever determined otherwise than by the act of 1879, which has been adjudged never to have become a law of the State? Did Wilkes County have authority, under the Ordinance of 1868 alone, to aid, by a subscription of stock and bonds, the construction of the second division of the road referred to in the act of 1879, extending from the towns of Winston and Salem, up the valley of the Yadkin by way of Jonesville and Wilkesboro, in the county of Wilkes, to Patterson's Factory, in the county of Caldwell? These are matters about which we do not feel disposed to express an opinion under the very general and indefinite questions certified from the Circuit Court of Appeals. Nor do we deem it proper to express any opinion as to the scope and the effect upon the rights of the parties of sections 1996, 1997, 1998 and 1999 of the Code of North Carolina. The certified questions do not directly or explicitly relate to any question arising under those sections of the Code; and it is not appro-

priate that this court should, under the questions certified, consider and determine the entire merits of the case." 180 *U. S.* 532.

That the qualified voters of Wilkes county gave their sanction to a subscription to the capital stock of the Northwestern North Carolina Railroad Company; that the bonds in suit are part of those issued in payment of such subscription; that stock was issued to the county to the full amount subscribed; that the road desired by the people of the county was constructed and is in operation; that for many years the county paid interest upon the bonds; and that the plaintiff purchased the bonds in suit for value and in good faith; these propositions are not disputed. However strongly these facts appeal to every one's sense of right and justice, they do not estop the county from raising the question of its power to have made the subscription and issued the bonds in question. We repeat what was said in the former opinion—indeed what had been held in many previous decisions—that if there was an absolute want of power to issue the bonds in question every purchaser of them was charged, in law, with notice of that fact, and could not look to the county in whose name they were issued. Such power could not be created by mere recitals in the bonds.

Did the county of Wilkes have power to issue these bonds? The plaintiff insists that the county had double legislative authority for issuing them; first, under the ordinance of 1868 incorporating the Northwestern North Carolina Railroad Company; second, under the above sections of the Code of North Carolina of 1883.

We have seen that at the time the bonds were issued the ordinance of 1868 was in force and gave power to counties embraced by its provisions to take stock in the North Western North Carolina Railroad Company and pay for it in county bonds. This was held, in our former opinion, to be taken as the law of North Carolina, because so declared by the Supreme Court of that State when the bonds were issued, and therefore as the law by which the rights of the parties were to be determined. So that the vital inquiry, on this part of the case, is whether the road in question was embraced by the provisions of the Ordinance of 1868, and therefore one that could be aided under that Ordinance by county subscriptions and bonds. If so, Wilkes county was plainly in the same category as Forsyth county, and its bonds (issued in payment of the subscription made by it) must be sustained as valid upon the same grounds as the Supreme Court of North Carolina approved in reference to the bonds issued by Forsyth county.

Turning now to the Ordinance of 1868, we find that the North Western North Carolina Railroad Company was incorporated to construct a railroad of one or more tracks "from some point on the North Carolina Railroad between the towns of Greensboro and Lexington, running by way of Salem and Winston in Forsyth county to some point in the northwestern

boundary line of the State, to be hereafter determined." No question arises in the present case as to the route adopted for the road that was constructed from its beginning point or eastern terminus to Salem and Winston, two towns near each other. It was mandatory under the ordinance that the road should run by the way of Salem and Winston. The road that Wilkes county desired to be built was from Salem and Winston to Wilkesboro. That was the road in aid of the construction of which its bonds were issued. If a road from Salem and Winston to Wilkesboro was substantially in the direction of "the northwestern boundary line of the State," then it would be one authorized by the Ordinance of 1868. The Ordinance did not fix the particular point in the northwestern boundary at which the northwestern terminus of the road should be established. It was some point, on that boundary, to be thereafter determined. Unless the legislature interferred and itself fixed the northwestern terminus of the road, the railroad company had the power to establish it at its convenience or as the necessities of the situation required, taking care that whatever route was adopted the road as constructed from time to time was to be, substantially, in the direction of some point in what was reasonably to be deemed the northwestern boundary line of the State. Undoubtedly those interested in the enterprise, as well as the Convention, contemplated that the road would be built mainly by money derived from municipal subscriptions and bonds. The railroad company was, therefore, left free to adopt a general route that would take the road "near or through" such counties as would aid the enterprise—no condition as to route being imposed except that the road should be in the direction of some point on the northwestern boundary line of the State. The authority of counties, by subscription of stock and bonds, to aid in the construction of a part of the road, did not depend upon the northwestern terminus being first established. If a county had authority, under any circumstances, to subscribe stock and issue bonds that authority could be exercised with reference to that part of the road in which, by reason of its location, it was immediately concerned. We are of opinion that the part of the North Western North Carolina Railroad which is here in question was, in a substantial sense, in the direction of some point in the northwestern boundary line of the State—due regard being had to the physical nature of the country through which it was to pass. The contention to the contrary cannot be sustained.

Looking further into the Ordinance of 1868, we find that it contemplated and authorized subscriptions by counties. It provided that all counties and towns subscribing stock to said company should do so in the same manner and under the same rules, regulations and restrictions as were set forth and prescribed in the charter of the Atlantic and North Carolina Railroad Company for the government of such towns and cities as were then allowed to subscribe to the capital stock of that company. Reading those provisions

of the charter of the Atlantic and North Carolina Railroad Company into the Ordinance of 1868, it is, we think, clear that any county near or through which the North Western North Carolina Railroad might pass (in the direction of some point in the northwestern boundary line of the State) could subscribe stock to be paid for by its bonds, provided, always, that the subscription was first approved by a majority of the qualified electors of the county voting upon the question of subscription. All these conditions were met in the case of Wilkes county. The qualified voters sustained the proposition to subscribe, and there is no substantial ground upon which to rest the contention that the county was without power, under the Ordinance of 1868, to make the subscription in question and to issue its bonds in payment therefor.

Other questions relating to the Ordinance of 1868 were discussed by counsel; but in the view we take as to its scope and meaning those questions need not be noticed in this opinion.

The appellees further insist that ample authority to issue the bonds in suit is also found in sections 1996, 1997, 1998, 1999 and 2000 of the Civil Code of North Carolina.

We do not deem it necessary to determine the scope of those sections; for, as we have seen, Wilkes County, independently of those sections, had authority under the Ordinance of 1868 to make the subscription and issue the bonds here in question. And this conclusion rests upon the law of North Carolina as declared by the Supreme Court of the State to have been at the time Wilkes County made its subscription and issued its bonds. This is sufficient to dispose of the case.

The judgment is *Affirmed.*

True copy.

Test:

Clerk Supreme Court, U. S.